Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Irene,Madison W
Student ID : 06634578

Print Date: 06/10/2023

-------- Academic Program --------

Program : Law JD
09/20/2021 : Law (JD)
Plan
Status Active in Program

-------- Beginning of Academic Record --------

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	P	
Instructor:		Freeman Engstrom, David				
LAW	205	CONTRACTS	5.00	5.00	P	
Instructor:		Sanga, Sarath				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	P	
Instructor:		Thesing, Alicia Ellen				
LAW	223	TORTS	5.00	5.00	P	
Instructor:		Mello, Michelle Marie Studdert, David M				
LAW	241A	DISCUSSION (1L): WHY IS THE USA EXCEPTIONAL -- IN CRIME AND PUNISHMENT?	1.00	1.00	MP	
Instructor:		Weisberg, Robert				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	P	
Instructor:		O'Connell, Anne Margaret Joseph				
LAW	207	CRIMINAL LAW	4.00	4.00	P	
Instructor:		Fan, Mary D.				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:		Bakhshay, Shirin				
LAW	2402	EVIDENCE	5.00	5.00	P	
Instructor:		Fisher, George				

LAW TERM UNTS: 14.00 LAW CUM UNTS: 32.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	217	PROPERTY	4.00	4.00	P	
Instructor:		Kelman, Mark G				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	P	
Instructor:		Bakhshay, Shirin				
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	4.00	P	
Instructor:		Weisberg, Robert				
LAW	7010A	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	3.00	P	
Instructor:		Liu, Goodwin Hon				
LAW	7081	FAMILY LAW II: PARENT-CHILD RELATIONSHIPS	3.00	3.00	P	
Instructor:		Banks, Ralph Richard				

LAW TERM UNTS: 16.00 LAW CUM UNTS: 48.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	P	
Instructor:		Weisberg, Robert				
LAW	3504	U.S. LEGAL HISTORY	3.00	3.00	P	
Instructor:		Ablavsky, Gregory R				
LAW	5040	LAW, LAWYERS, AND TRANSFORMATION IN DEMOCRATIC SOUTH AFRICA	3.00	3.00	P	
Instructor:		Liu, Mina Titi O'Connell, James				
LAW	7030	FEDERAL INDIAN LAW	3.00	3.00	P	
Instructor:		Reese, Elizabeth Anne				
LAW	7836	ADVANCED LEGAL WRITING: APPELLATE LITIGATION	3.00	3.00	MP	
Instructor:		Makhzoumi, Katherine				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

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Law Unofficial Transcript

Name : Irene,Madison W
Student ID : 06634578

LAW TERM UNTS: 16.00 LAW CUM UNTS: 64.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	2.00	0.00		
Instructor:		Fisher, Jeffrey				
LAW	2401	ADVANCED CIVIL PROCEDURE	3.00	3.00	P	
Instructor:		Zambrano, Diego Alberto				
LAW	6004	LEGAL ETHICS: THE PLAINTIFFS' LAWYER	3.00	3.00	P	
Instructor:		Engstrom, Nora Freeman				
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	P	
Instructor:		Freeman Engstrom, David				

LAW TERM UNTS: 10.00 LAW CUM UNTS: 74.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	904A	CRIMINAL DEFENSE CLINIC: CLINICAL PRACTICE	4.00	0.00		
Instructor:		Horne, Carlie Ware Tyler, Ronald				
LAW	904B	CRIMINAL DEFENSE CLINIC: CLINICAL METHODS	4.00	0.00		
Instructor:		Horne, Carlie Ware Tyler, Ronald				
LAW	904C	CRIMINAL DEFENSE CLINIC: CLINICAL COURSEWORK	4.00	0.00		
Instructor:		Horne, Carlie Ware Tyler, Ronald				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 74.00

END OF TRANSCRIPT

Anne Joseph O'Connell
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write, with great enthusiasm, to recommend Madison Irene—an integral member of our law school community and one of our most committed public interest students—for a clerkship in your chambers. Unlike almost all of her peers at Stanford Law School, Madison worked more than full-time hours in high school to help support her family as a janitor, cake decorator, and Starbucks barista, among other jobs. As a law student, she gives more than any other student I am writing for this year to others—from selecting articles for the Stanford Law Review to co-running the Stanford Latinx Law Students Association, which hosted an astounding gala featuring Health and Human Services Secretary Xavier Becerra that likely involved more planning and fundraising than a decent-sized wedding.

I first met Madison in January 2022 when she was assigned to my Constitutional Law section, along with sixty-one other students. The nine-week mandatory class for first-year students covers the powers of and limits on the federal courts, Congress, and the President, as well as the powers of and limits on the states. It is not an easy class. In addition to the final examination, I require students during the quarter to write one response paper on their own or with up to two partners (with the option of writing a second paper and having the higher score count in the final grade) and to make an (ungraded) oral presentation tied to recent district court litigation. Combining her response paper and final examination, Madison earned a strong Pass grade in my class.

Writing with a classmate, Madison submitted a persuasive response paper—analyzing how the primary methods of interpretation (textualism, intratextualism/structuralism, originalism, pragmatism/living constitutionalism, and precedentialism) feature in McCulloch v. Maryland and deciding which method provides the most compelling justification for the Court's decision. Madison and her partner nicely summarized and applied each method. For instance, they noted: "In this decision, originalism wasn't the most dominant method of interpretation, but it was used to bolster important moments." They perceptively added: "In McCulloch, pragmatic claims were often used to support originalist claims." Overall, in an organized and clearly written essay, they showed how Chief Justice Marshall "most effectively used textualism/intratextualism and pragmatism in McCulloch."

Although receiving a score above the mean, Madison and her partner decided to write a second response paper—comparing the legislative veto and line-item veto on doctrine and on policy grounds. In a solid essay, they argued against the Supreme Court's decisions barring these tools. I was particularly struck by their compelling analysis of the line-item veto: "What the [line item veto] provides is a mechanism by which the Executive and Legislative branches can perform a negotiation of sorts in passing certain legislation. The ample checks that each branch provides on the other through the process provides protection enough against aggrandizement of either branch."

In the primary evaluative tool in my class, a timed and difficult take-home examination, Madison shined on the broader-ranging question—specifically, on how concerns of government workability and individual liberty are related, including their connections and gaps, doctrinally and normatively. While initially noting the tension between government workability and individual liberty, she smartly pointed out that cases, including the Chinese Exclusion Cases and Gonzales v. Raich, implicating government workability "often involved an expansion of the federal government's powers, which then logically begins to raise concerns of government overreach and the need to protect individual liberty."

Madison demonstrated doctrinal comprehension in the two thorny issue spotters: one on the federal regulation of intrastate waters that provide a habitat for migratory birds and endangered species (focusing on Congress's power and limits) and one on proposed revisions to the selection and removal of inspectors general (focusing on separation of powers and the Appointments Clause). She has a good command of complex doctrine.

For the oral "argument," assigning students the district court materials in Missouri v. Biden, I had Madison represent the United States defending against Spending Clause challenges to the Biden Administration's COVID-19 vaccine mandates for federal contractors. It was one of the strongest oral presentations in the class. Madison also showed her ability to process and coherently explain complex legal material orally throughout the quarter when I called on her. She addressed questions on precedentialism, the Commerce Clause, and policy concerns about delegation, among other topics.

In sum, I am a big fan of Madison. Fewer than eight percent of federal law clerks are Latinx. Madison should obtain a clerkship because of her legal knowledge, genuine and diverse interests in the law, strong writing, and exceptional human decency—and

the judiciary's role in shaping the legal careers of recent graduates. If you should need any additional information, please contact me at (415) 710-8475 (cell) or at ajosephoconnell@law.stanford.edu. I would be delighted to talk more about Madison.

Sincerely,

Anne Joseph O'Connell
Adelbert H. Sweet Professor of Law

Law Clerk, Judge Stephen F. Williams
Law Clerk, Justice Ruth Bader Ginsburg

Ronald C. Tyler
Professor of Law
Director, Criminal Defense Clinic
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to urge your consideration of Madison Irene for a judicial clerkship.

I am the Director of Stanford's Criminal Defense Clinic. I taught Madison during the spring quarter of 2023. Due to the small size of the clinic, I get to know my students well.

When Madison applied for clinic during her 1L summer, her scholastic and personal background made her an intriguing applicant. I was struck by the significant years of public service by someone so young. During the entirety of her undergraduate education at the University of Chicago, Madison worked as a teacher's aide on the South Side of Chicago, teaching world literature to tenth graders. I was impressed to learn that she developed culturally responsive lesson plans and lectures. The breadth of Madison's other pre-law experiences was also noteworthy: she worked at a domestic violence nonprofit, a criminal justice reform agency, and at the Cook County State's Attorney's Office. As I formed my clinical cohort, I saw a real benefit from Madison's openness to competing perspectives. That flexibility would also serve her well in a clerkship.

Madison's law school coursework and activities were also important determinants for successful clinical work. In her application materials, Madison shared that her enjoyment of Evidence and Criminal Procedure strongly influenced her decision to apply to my clinic. Her comfort with legal doctrine was reassuring. I was also heartened by her involvement in the Prisoner Legal Services Pro Bono Project teaching creative writing to inmates. That work demonstrated Madison's facility with the written word and her steadfast commitment to public service.

Madison's lack of Honors grades during her 1L year was not an impediment to her selection for my clinic. I have found that relying on the results of Stanford's grade normalization within a pool of academic high achievers unfairly excludes many fine students. Instead, I took into account Madison's exemplary record at the University of Chicago, where she was on the Dean's List every semester. I was also mindful of her background as a first-generation student from a low-income family. Madison shared that she worked 40-50 hours a week, even in high school. Her father was largely absent during her childhood, due to addiction. Her mother struggled with serious mental health issues. Madison excelled in spite of those considerable impediments. With her academic preparation and her lived experience, I was confident that Madison was up to the challenge of my clinic.

In the recent Criminal Defense Clinic term, students worked on behalf of individuals facing state misdemeanor charges. Student pairs undertook actual representation, including motions work and evidentiary hearings (under close supervision). As the primary point of contact with our clients, students were expected to develop the necessary rapport for effective, holistic representation. Within the ten-week quarter, they were expected to acquire doctrinal and advocacy skills, conduct factual and legal investigation, file motions, and conduct evidentiary hearings. Not everyone excels under the strain of these numerous responsibilities. Madison performed well. She demonstrated solid achievement in fundamental lawyering skills, all readily transferable to the judicial clerkship context.

Madison was always eager to learn and grow. As she described it, she was "open and sponge-like" for every faculty supervision session. Her legal writing skills improved steadily over the course of the quarter. Madison and her partner prepared a multi-pronged suppression motion on behalf of their client. Through meticulous investigation, they discovered evidence that seriously undermined the proffered basis for the traffic stop. They crafted arguments challenging the seizure, highlighting the prolonged detention, and forcefully asserting the unconstitutional nature of the search of their client.

Madison worked conscientiously with her clinic partner as the hearing date approached. They refined their brief. They mooted cross examinations and oral argument. They identified defense experts to rebut potential prosecution testimony. Then, on the day the prosecution's brief was due, the district attorney abruptly dismissed the case. Madison was elated for her client, even though the dismissal meant that her work on the brief ended, and her chance for in-court advocacy evaporated. Still, Madison benefited greatly from her clinic experience, including focused instruction on legal writing. She is a solid writer who will continue to gain proficiency in her 3L year, given her editing responsibilities on the *Stanford Law Review*.

Beyond her growing legal acumen, what impresses me most about Madison is her drive. She pushed herself to meet the challenges of learning and executing case strategy on the clinic's tight spring schedule. Even when she was sidelined by illness, Madison insisted on continuing to work remotely, as soon as she was able. I believe I understand the source of her tenacity: over

her lifetime, Madison has experienced real adversity that is foreign to most of her classmates. Still, she rises. Still, she thrives.

I heartily recommend Madison Irene for a judicial clerkship.

Sincerely,

/s/ Ronald C. Tyler

Ron Tyler - rtyler@law.stanford.edu - 650-724-6344

StanfordLawSchool

JENNY S. MARTINEZ
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Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

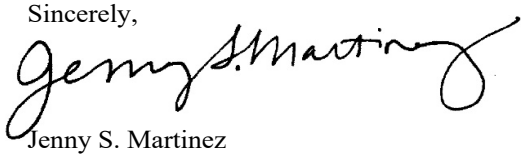
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Diego A. Zambrano
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Madison Irene for a clerkship in your chambers. Madison was a good student in my Advanced Civil Procedure class. She was intelligent, engaged with the material, and professional. Madison is a passionate student, deeply involved in the *Stanford Law Review* and the Stanford Law Latino Student Association. Madison's most defining features are her passionate commitment to social justice and her devotion to understanding how law affects society on the ground. Coming from a difficult upbringing with a single mother, Madison has devoted her legal career to civil rights and public defense. If you're looking for a student devoted to social justice and how the law affects the less fortunate, Madison is it. I believe she would be a good clerk.

Madison was a student in my Advanced Civil Procedure class. As you may know, this class provides instruction in some of the most important and foundational concepts in our litigation system, including class actions and multidistrict litigation. I, therefore, have a unique view of Madison's aptitude for litigation and the way our judiciary operates. I can tell you that she is a committed law student who stays on top of the material and is devoted to the substantive effects of law on society. Madison's qualities shine through her thought-provoking discussions on the intricate interplay between procedural and substantive justice. In Advanced Civ Pro, Madison consistently demonstrated a solid capacity to zoom out and grasp the tangible ramifications of civil procedure on the protection of substantive rights. Actively participating in classroom deliberations, she would raise normative considerations, such as critically questioning the effectiveness of class actions in safeguarding vulnerable litigants and delving into the delicate equilibrium between judicial efficiency and fairness to individuals.

Let me say a word about Madison's deep involvement outside the classroom. She plays a significant role as the Stanford Law Latino Student Association President. This experience is particularly challenging because Madison had to deal with a difficult time at the law school where diversity and inclusion issues were at the forefront. And the job is demanding. She has had to manage a 15-person board, plan and execute a series of events (bringing alumni and community together), support pan-affinity efforts, and host a series of meet-ups with alumni. In this role, she met frequently with Dean Martinez and other members of the Administration. Madison told me how she had to channel student concerns and questions to members of the Administration. She focused on building a community among the student body. I've seen her leadership on this front. Recently at an alumni event, Madison spoke to an audience of 200 people.

In my time getting to know Madison, I have seen her display moral righteousness and passionate defense of the less fortunate. Again, it is clear that Madison is motivated by a deep sense of social justice. Many of her questions and comments represent a perspective concerned with access to justice and the fairness of the legal system for under-resourced parties. Sometimes I get the impression that Madison considers herself an activist, deeply committed to racial issues of diversity and inclusion. She is so committed to these issues that they come up in many conversations with Madison. I believe one of her goals is to help Stanford Law School better support its minority students. Madison has also been involved in some contentious activities at the Law School as the president of SLLSA. She definitely embraces a perspective closer to critical legal studies. It's clear that Madison's profound commitment to these issues is central to her identity, her legal package, and her time at the Law School. One slight worry is that Madison is so deeply committed to these issues that she often forgets the broader context and can let herself be guided by ideology.

Madison's commitment to making a meaningful impact extends beyond the classroom, as evidenced by her active engagement in various extracurricular pursuits. Notably, she dedicates her time and expertise to three pro bono projects, including the Native Law and Prisoner Legal Services initiatives, which are highlighted on her resume. In addition to these endeavors, Madison goes above and beyond by volunteering as a creative writing instructor for inmates at the San Mateo County jail through her involvement with the Stanford Prisoner Abolition and Resources Coalition (SPARC). This commitment spans across her 1L and 2L years, with plans to continue into her 3L year. Furthermore, during the Winter Quarter of her 2L year, Madison served as a Legal Assistant for Professor Reese, where she played a pivotal role in evaluating the diverse civil procedure code adoption and amendment processes among federally recognized tribes. Currently, she actively participates in the Criminal Defense Clinic, collaborating with a fellow student to craft and present a compelling Motion to Suppress that engages with pressing legal issues. Looking ahead, Madison is set to participate in Moot Court next year, further honing her advocacy skills and deepening her understanding of the law.

From the onset of her law school journey, Madison has also harbored a profound interest in public defense work. This enthusiasm prompted her to secure a summer internship in the felony division at the esteemed San Francisco Public Defender's Office.

During her time there, Madison drafted numerous pre-trial and post-conviction motions but also stood on the record in court, arguing bail motions and preliminary hearings. She emerged as the intern with the highest number of on-the-record arguments in her intern class, a testament to her dedication. After this experience, her interest in criminal appellate and post-conviction work grew, prompting her to contemplate alternative avenues within the criminal justice system. Furthermore, Madison's law school journey presented her with unexpected opportunities for exploration, as she discovered a genuine affinity for classes like Civil Procedure, which sparked her contemplation of civil rights litigation and constitutional litigation. Despite coming from a low-income background and being cognizant of the financial realities of pursuing such paths, Madison made a conscious decision to prioritize her passion for public interest law. This decision was evident when she navigated the law firm interview process, ultimately opting not to pursue any callbacks as her heart and mind were steadfastly dedicated to public service. Madison is brimming with excitement to embark on an eight-week stint at the Constitutional Accountability Center in Washington, D.C., where she will contribute to SCOTUS and federal appellate amicus briefs, intertwining progressive originalism arguments.

Let me also mention Madison's upbringing in a low-income family, where she was raised by a single mother coping with mental health issues and an absent father struggling with addiction. This undoubtedly instilled in her a deep sense of resilience. Despite the chaotic and tumultuous nature of her early years, Madison found solace in a vibrant community that provided support and guidance. Madison told me that when she entered college, her desire to create meaningful change for individuals like her friends and family led her to major in psychology, initially considering social work or psychiatry. However, she told me that it was an internship at a Domestic Violence Legal Clinic that ignited her passion for justice reform and litigation.

The bottom line is this: Madison is a good student; a future civil rights attorney or public defender; passionately committed to social justice and critical legal studies; professional and decent; as well as a hard worker.

Sincerely,

/s/ Diego A. Zambrano

Diego Zambrano - dzambrano@law.stanford.edu

Elizabeth H. Reese
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write with my very strong recommendation of Madison Irene for a clerkship position in your chambers. Madison is an incredibly hard worker, a dedicated student and campus leader, and she will be a great clerk.

I have gotten to know Madison very well since she decided to take my Federal Indian Law class in the Fall of her 2L year. Madison clearly worked exceptionally hard in my class. I could tell from the way she showed up to class every day with piles of notes and nodding along as I was making certain points during lecture. She was deeply invested in the subject matter in a way that was, frankly, inspiring for me as an instructor.

Madison came to office hours almost every week to ask me questions. Madison's questions were always a mix of two types that impressed me for different reasons. First, there were the deep and insightful questions that reflected how truly in the weeds she was with all the material. Those were impressive for the obvious reasons. But then there were the basic questions. These were incredibly impressive and helpful for a different reason. This was the first time I was teaching Federal Indian Law, and so I was really worried about doing a good job. Veteran law professors just know what part of the material is hard for students to grasp year after year, and so they emphasize it naturally. As a new Professor, I was in the dark about what key parts of the material I was not doing a good job explaining. It was Madison and her dedication to the class and really understanding it that let me know what I needed to explain better or go over again. This was so impressive to me because it is a testament to her desire to really understand the material and get the issues right—above her own ego. I can't tell you how many law students are worried about appearing smart, and so they don't ask the important basic questions. They worry they will look dumb, when it is really me who needs to know what I am messing up! It's students like Madison who have a pure dedication to understanding the material that are the reason I can be a good teacher. I also think this will be an incredibly important asset for her as a clerk. From my own clerkship experiences, I know how often you are dropped into many different areas of the law that you have no experience with. The job is figuring it out, and there is no room for ego and assumptions that you know more than you do. Madison will be the kind of clerk who will work her tail off late into the night and try her hardest to get it right. She won't make the kind of lazy or stupid mistakes that frustrate you. It is simply not in her character or her nature.

I was a bit heartbroken to see that Madison just missed the cutoff for an "H" in my class. I know she understands the material. Based on her exam compared to my conversations with her, it seems like she simply is not very good at taking law school exams. Now that I have seen the rest of her transcript, I expect that it reflects the same thing. She is smart and exceptionally hard working; she just has not figured out how to perform well on these very specific kinds of exams. It is a more common problem for students like Madison who are from low-income families without the same connections and resources to focus them on that kind of test-taking skill acquisition.

After taking my class, Madison applied to be one of my research assistants. I had the upmost confidence hiring her, even though she had not earned an H in my class. I knew she would work hard and do an excellent job, and that is exactly what she did. I had Madison working with a team of students tracking down tribal court civil procedure codes. It was a heavy research lift, and Madison's work was fantastic!

A final word about Madison's character and leadership qualities. She is one of the co-presidents of the Stanford Latinx Law Association. That is an incredibly demanding leadership role on campus, and she has served in it brilliantly. Madison is an incredibly humble person. As I mentioned before, she does not have an ego. But she puts herself forward to do things she cares about because she thinks it is important. It makes her approach to her leadership positions and the communities she is a part of feel particularly caring. That sense of care is infectious. If you hire her as a clerk, she will not be the loudest person in the room. She will be the person in the room quietly working her tail off and keeping everyone honest.

I strongly encourage you to hire Madison. She will be a great clerk and a fantastic lawyer. She has a strong head on her shoulders that will keep her grounded throughout her legal career. You will enjoy having her as a clerk you can stay in contact with over the years, just as I will.

Sincerely,

/s/ Elizabeth H. Reese

MADISON IRENE

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Writing Sample

I drafted the attached writing sample as an independent directed research project in my second year of law school. This note has been submitted, but at this time has not yet been accepted, for publication. For my note, I analyzed *Heck* doctrine and did an analysis of how some lower courts have been applying *Heck* to block § 1983 over-detention lawsuits. I performed all of the legal research, writing, and citations for this paper entirely on my own. My faculty supervisor for this project provided one round of feedback, which included three general and brief organizational comments. No line edits have ever been made on this piece by anyone else.

What The *Heck* Is Going on With Over-Detention: How Courts Are Using Habeas to Block § 1983 Suits, and Why They're Wrong To Do So

By: Madison Irene

Abstract

Whether one is acquitted, has their charges dismissed, or has their full sentence served, a person is not "free" until jailers actually effectuate his or her release. Since 1994, the U.S. Supreme Court has held that certain § 1983 claims brought by incarcerated and formerly incarcerated folks cannot be heard, because they must first be heard in habeas proceedings. This is a result of Heck *doctrine and its progeny. This Note specifically focuses on over-detention claims being brought under § 1983, and whether or not they can be barred by* Heck *doctrine. There are two main types of over-detention cases focused on in this Note. The first is 'classic' over-detention where the plaintiff's legal sentence date has passed yet they are still being detained. The second type is sentence calculation over-detention where the plaintiff alleges that some type of calculation error has been made which has or will keep them over-detained.*

This Note is the first to look at Heck *doctrine as it's being applied to over-detention cases. In addition to synthesizing and analyzing the different ways in which courts are applying Heck to § 1983 over-detention claims, this Note argues that* Heck *doctrine should not bar § 1983 suits for 'classic' over-detention situations, proposes a method of analysis for analyzing some of the trickier sentence calculation cases, and finally, pushes back against the mechanisms some of the courts seem to be developing.*

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Introduction

In 2017, a Louisiana state auditor report found that state prisons and local jails were over-detaining people for weeks, months, and in some cases years, in large part due to an inadequate system for calculating sentences.[1] In one extreme case, a man was imprisoned for three years past his judge ordered release date.[2] While many others are over-detained for a smaller amount of time, they all suffer from a denial of their fundamental right to liberty. The mind boggling aspect of over-detention cases are their factual simplicity. An extension of false imprisonment[3], classic over-detention cases involve a release date that is uncontested by both the state and the prisoner, but for whatever reason the prisoner was not released from incarceration on that date.

Take Johnny Traweek, for example. Mr. Traweek was sentenced to twenty two days of jail time in New Orleans in 2018.[4] Mr. Traweek had decided to take a plea deal, not because he believed he was guilty, but because he wanted to get out of jail quickly and figured that if he took a plea he would be credited with time served.[5] He was right.[6] Or at least he should have been. After pleading guilty the judge granted Mr. Traweek's sentence as time served; however, Mr. Traweek was not released from jail for another twenty-two days.[7] Once released Mr. Traweek filed a § 1983 lawsuit against the jail and the sheriff's office.[8] The sheriff's office, however, is currently arguing that Mr. Traweek's claim is legally unable to be heard because it is

[1] Richard A. Webster & Emily Lane, *Louisiana Routinely Jails People Weeks, Months, Years After Their Release Dates*, TIMES-PICAYUNE, Feb. 21, 2019, https://www.nola.com/news/article_988818dd-2971-51c8-82d5-096eef5ffba5.html.
[2] *Id.*
[3] *False Imprisonment*, BLACK'S LAW DICTIONARY (11th ed., 2019).
[4] Webster & Lane, *supra* note 1.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

barred by *Heck* doctrine.[9] If upheld, this would leave Mr. Traweek without access to a § 1983 remedy for his constitutional wrong.

The impacts of this would be devastating as the problem of over-detention extends far beyond Mr. Traweek. In 2023, the U.S. Department of Justice released an investigative report finding that Louisiana "incarcerates thousands of individuals each year beyond their legal release dates in violation of the Fourteenth Amendment."[10] In Baltimore, a class action lawsuit was filed providing evidence that between March of 2004 and June of 2005 somewhere between 2,200 and 1,000 over-detentions occurred.[11] In 2019 another lawsuit was filed against Baltimore Central Booking, this one estimating that out of a 100-case sample, "Baltimore detainees lose a collective eight years of freedom annually."[12] These are only a few of the many lawsuits that have been filed where people have been incarcerated for extended periods of time beyond their release date.[13] But despite this being such a clear cut problem, courts have struggled to identify a common solution to properly remedy these constitutional harms.[14] Similarly there is a notable absence of academic literature on over-detention. This Note is the first to focus on *Heck* doctrine and how it's being applied in some courts to over-detention cases.

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[9] Brief for Petitioner at 18, Traweek v. Gusman, (2022) (No. 19-1384-MLCF-JVM).
[10] U.S. DEP'T OF JUST., INVESTIGATION OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS (2023) [hereinafter DOJ INVESTIGATION OF LDPSC], https://www.justice.gov/d9/pressreleases/attachments/2023/01/25/2023.1.25_ldoc_findings_letter_final_508_0_0.pdf.
[11] Danny Jacobs, *'Overdetention' Claim in Central Booking Lawsuit Thrown Out*, DAILY RECORD, Mar. 3, 2015, https://thedailyrecord.com/2015/03/03/overdetention-claim-in-central-booking-lawsuit-thrown-out/.
[12] Lea Skene, *Detainees 'Unconstitutionally' Held at Baltimore Central Booking Long After court Grants Release, Lawsuit Claims*, BALT. SUN, Mar. 16, 2022, https://www.baltimoresun.com/news/crime/bs-md-ci-cr-lawsuit-claims-overdetention-20220316-4sr7qvlgmvdfbk33ttwffs666y-story.html.
[13] *See* Matt Reynolds, *California Can't Even Count, Ex-Inmate Says*, CAL. COURTHOUSE NEWS SERVICE, Feb. 21, 2013, https://www.courthousenews.com/california-cant-even-count-ex-inmate-says/; ACLU of Hawaii, *Overdetention Case Will Go To Trial*, ACLU, Jan. 15, 2010, https://www.aclu.org/press-releases/prison-overdetention-case-will-go-trial; David Reutter, *$731,000 Jury Award to Illinois DOC Prisoner Held 23 Months Beyond Release Date, Over $210k in Fees Awarded As Well*, PRISON LEGAL NEWS, Nov. 2021, https://www.prisonlegalnews.org/news/2021/nov/1/731000-jury-award-illinois-doc-prisoner-held-23-months-beyond-release-date-over-210k-fees-awarded-well/.
[14] *See infra* Part III.A.

In *Heck v. Humphrey* the Court introduced the case as lying "at the intersection of the two most fertile sources of federal-court prisoner litigation . . . 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254."[15] *Heck* was not the first time that habeas procedure and § 1983 had come into tension with one another, and it would not be the last. *Heck* resulted in a unique holding that would become known as the *Heck* bar.[16] The *Heck* bar states that if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence" then the § 1983 claim is barred by *Heck* in federal court and instead must first go through habeas procedure.[17] Only if the plaintiff is successful in state or federal habeas may they then seek damages through a § 1983 suit.[18] Throughout *Heck* the Court also specifically mentions confinement, writing that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that *necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement*."[19]

Over-detention cases don't neatly fit into *Heck*. Because while § 1983 claims on the basis of over-detention do not imply the invalidity of the prisoner's conviction or sentence, they do directly challenge one's confinement. So the question becomes, are § 1983 claims for over-detention barred by *Heck*? There are very real and serious consequences to the answer of this question. For example, there are major downsides to over-detaining folks. Not only does it affect the liberty rights of those who remain incarcerated, but it's also pricey. In one singular Louisiana case "[a]t an average cost of $54.20 per day to house an inmate, that's an extra $120,107

[15] Heck v. Humphrey, 512 U.S. 477, 480 (1994).
[16] *Id*.
[17] *Id*. at 487.
[18] *Id*.
[19] *Id*. at 486 (emphasis added).

taxpayers spent- not including the court settlements that came later."[20] And not only is over-detention costly to tax-payers, but when prisoners are not released on time they can lose placements they secured for housing, treatment programming, or any jobs they had lined up. [21] Meaning that even if the individual is over-detained for a few days or a week it can still have devastating consequences on their life.

Having access to § 1983 as a remedy is an important tool for combatting systemic over-detention; without which incarcerated and formerly incarcerated folks lack tools at their disposal to hold the system accountable and seek remedy for themselves. For one thing, the amounts of time folks are typically over-detained for often is often not long enough to go through habeas.[22] Even if a habeas motion is immediately filed at the point of over-detention it is unlikely it will ever be heard in time to reach a verdict before the plaintiff is released.[23] Therefore, civil tort actions are the only means by which the government can be held accountable for their actions.[24] Another thing is that § 1983 remedies typically far surpass state civil tort remedies both in their efficiency, the ability to request punitive damages, and timeliness of payout if successful.[25] In Louisiana, for example, due to lack of a state funds to payout civil law suits all civil state tort acts where the plaintiffs are successful get added to a list.[26] Every so often a few million dollars will be budgeted to be dispersed to the plaintiffs on the list until their total award is paid. This method of payment is exceedingly inferior to that which is obtained through a § 1983 suit.[27]

[20] Webster & Lane, *supra* note 1.
[21] *See also id.*
[22] Zoom Interview with Emily Washington, Deputy Director, McArthur Justice Center, New Orleans (Feb. 24, 2023).
[23] *Id*.
[24] *Id*.
[25] Telephone Interview with William Most, Name Partner, Most & Associates (Feb. 23, 2023) (Mr. Most has handled many of the over-detention lawsuits in New Orleans).
[26] *Id*.
[27] *Id*.

This Note addresses the problem of the *Heck* bar and over-detention cases in five parts. Part I of this Note defines and explains the four key players that are working with and against each other trying to navigate *Heck* doctrine: over-detention, good-time credits, § 1983, and habeas. Part II reviews the current doctrinal landscape of § 1983 and habeas law collisions and how the *Heck* bar comes into play. And Part III situates *Heck* doctrine in the current literature and explains why over-detention cases pose a specific problem when it comes to *Heck* doctrine.

Part IV provides a qualitative survey of over-detention cases in the federal courts and whether or not over-detention cases are barred by *Heck*. The different circuit courts have analyzed this issue at different levels but have taken vastly different approaches. While I analyze and separate out cases by circuit, this is not to imply that all of the cases are Court of Appeals cases but rather that both federal district and appeals courts were looked at and then separated by circuit to more clearly elucidate differing philosophies. This is still an issue being actively litigated, with new and creative arguments around *Heck* constantly being put forth. I add the analyses of good-time credit cases to the conversation about over-detention cases because often times the two issues go hand in hand. There are many instances where the over-detention claim arises from a miscalculation of good time credit. Finally, Part V is a normative section which argues that *Heck* should not bar any 'classic' over-detention cases, proposes a method of analysis for analyzing some of the trickier sentence calculation cases, and finally, pushes back against some of the 'threshold' mechanisms some of the courts seem to be developing to answer these questions.[28]

[28] U.S. DEP'T OF JUST., INVESTIGATION OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS (2023) [hereinafter DOJ INVESTIGATION OF LDPSC], https://www.justice.gov/d9/pressreleases/attachments/2023/01/25/2023.1.25_ldoc_findings_letter_final_508_0_0.pdf.

I. Defining Key Players

The focus of this Note is on *Heck* doctrine and the ways in which *Heck* doctrine is being interpreted in different ways by the courts when it comes to over-detention and good-time credit cases. Before delving into the complexities of why this is and what the various outcomes are, this section aims to give basic definitions and summarize the key concepts at play. In addition to defining over-detention and good-time credits this section gives a basic introduction to § 1983 and habeas doctrine. These are the four foundational concepts operating within the *Heck* doctrine that will be built upon and analyzed throughout this Note.

A. Over-Detention

Over-detention is when a prisoner remains incarcerated past their legal confinement.[29] In other words, someone has been over detained when the amount of time in their legal sentence has passed, yet they remain incarcerated. Over-detention is newer and more specific than traditional false imprisonment. Black's Law Dictionary defines false imprisonment as "the restraint of a person in a bounded area without legal authority, justification, or consent."[30] To be clear, over-detention is a form of false imprisonment. But it more accurately describes what's actually occurring, because of false imprisonment's loaded historical association with false arrest, of which over-detention has nothing to do with. Indeed, "[s]ome courts have described false arrest and false imprisonment as causes of action which are distinguishable only in terminology. The two have been called "virtually indistinguishable, and identical."[31]

[29] *See, e.g.*, Jillian Kramer, *Former Inmate Can't Hold State Corrections Official Liable for 'overdetention,' Appeals Court Says*, THE TIMES-PICAYUNE, (Feb. 10, 2022), https://www.nola.com/news/courts/article_8dc41acc-8a9e-11ec-a7a5-e79d23da9eea.html.
[30] *False* Imprisonment, BLACK'S LAW DICTIONARY (11th ed. 2019).
[31] 32 Am. Jur. 2d *False Imprisonment* § 3 (1995).

They're not, however, because while a person who is falsely arrested is necessarily falsely imprisoned, a person falsely imprisoned may not have been falsely arrested at all.[32] This is exactly what the term over-detention describes. Nothing is assumed about one's arrest or conviction, instead the term suggests that there is a proper amount of detention and this is the term to use when one has been held over that proper amount of time.

Over-detention can happen for a multitude of reasons, from bureaucratic and administrative laziness to intentionally preventing one from leaving incarceration. The later, however, is much more common.[33] Or at least, much more commonly litigated and reported on. For example, in January of 2023 the United States Department of Justice (DOJ) released an investigative report on the Louisiana Department of Public Safety and Corrections.[34] The DOJ found that the Louisiana Department of Corrections "incarcerates thousands of individuals each year beyond their legal release dates in violation of the Fourteenth Amendment of the United States Constitution."[35] These are cases of over-detention due, in large part, to administrative laziness. The DOJ found that this systemic over-detention was due to serious deficiencies in the Department of Correction's policies and practices.[36] Perhaps one of the most frustrating aspects

[32] *Id.*
[33] *See e.g.* Lea Skene, *Detainees 'Unconstitutionally' Held at Baltimore Central Booking Long After court Grants Release, Lawsuit Claims*, BALT. SUN, Mar. 16, 2022, https://www.baltimoresun.com/news/crime/bs-md-ci-cr-lawsuit-claims-overdetention-20220316-4sr7qvlgmvdfbk33ttwffs666y-story.html.
[33] *See* Matt Reynolds, *California Can't Even Count, Ex-Inmate Says*, CAL. COURTHOUSE NEWS SERVICE, Feb. 21, 2013, https://www.courthousenews.com/california-cant-even-count-ex-inmate-says/; ACLU of Hawaii, *Overdetention Case Will Go To Trial*, ACLU, Jan. 15, 2010, https://www.aclu.org/press-releases/prison-overdetention-case-will-go-trial; David Reutter, *$731,000 Jury Award to Illinois DOC Prisoner Held 23 Months Beyond Release Date, Over $210k in Fees Awarded As Well*, PRISON LEGAL NEWS, Nov. 2021, https://www.prisonlegalnews.org/news/2021/nov/1/731000-jury-award-illinois-doc-prisoner-held-23-months-beyond-release-date-over-210k-fees-awarded-well/
[34] U.S. DEP'T OF JUST., INVESTIGATION OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS (2023) [hereinafter DOJ INVESTIGATION OF LDPSC], https://www.justice.gov/d9/pressreleases/attachments/2023/01/25/2023.1.25_ldoc_findings_letter_final_508_0_0.pdf.
[35] *Id.* at 1.
[36] *Id.*

of over-detention is how non-controversial it should be. Even in times of gross polarization, it would seem that everyone should agree that someone should only be jail for as long as they were sentenced to be in jail. And that if they're in jail for longer than they're supposed to be, through no fault of their own, then they should have a remedy for that wrong.

B. Good-Time Credits

Good-time credits are awarded by prison personnel and at their maxim they have the potential to reduce one's sentence by more than one half.[37] Contrary to what one may initially suspect, good-time credit is typically not awarded; but is instead expected as part of serving time and then taken away as a punishment for bad behavior.[38] The first good-time credit law was adopted in 1817 in New York state and by the end of the century forty four other states had adopted them.[39] The first federal good-time credit law was enacted in 1875.[40] It's difficult to get actual data on the reasons for which good-time credit can get granted or taken away because judicial decisions on taking away good-time are typically about the procedures used to take it away and not whether substantively the grant or denial of good-time was proper.[41] The decision of revoking someone's good-time credits, substantively speaking, can generally be sustained based solely on the word of a single prison guard.[42] In addition to good-time credits for good behavior, credit can also be given participation and completion in prison programs or for completing work.[43]

[37] James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 218 (1982) (citing, F. ZIMRING, MAKING THE PUNISHMENT FIT THE CRIME: A CONSUMER'S GUIDE TO SENTENCING REFORM 4-6 (1997)).
[38] James B. Jacobs, *Good Time*, UCLA L. REV. 217, 218.
[39] RONALD L. GOLDFARB & LINDA R. SINGER, AFTER CONVICTION 262, (1973).
[40] Act of March 3, 1875, ch. 145, 18 Stat. 479, 480.
[41] James B. Jacobs, *Good Time*, UCLA L. REV. at 219.
[42] *Id*.
[43] *Id*. at 220.

For the purposes of this Note good-time credits are being discussed for their close relationship with both *Heck* doctrine and with over-detention cases. Meaning that good-time credits are important to understand both the factual background of many of the cases, but also because the reasoning in some of the good-time credit cases can provide useful analytical tools for over-detention cases.

C. § 1983

42 U.S.C. § 1983, formerly known as the Ku Klux Klan Act of 1871, conferred jurisdiction on the federal district courts to hear a state prisoner's application for injunctive relief against allegedly unconstitutional conditions of confinement.[44] More broadly, the act "created a cause of action against those who, acting under color of state law, deprived citizens of their rights, privileges, or immunities secured by the Constitution."[45] What all this means in practice is that the law gives the power to individuals to sue their state or local government if they violated their federal constitutional rights. It allows people to do so by giving them an immediate entrance into federal court without first having to exhaust state remedies.[46] This was vitally important in the South during the Reconstruction Era where state courts were often unable and unwilling to stop the deprivation of rights against recently emancipated slaves by the Ku Klux Klan.[47] In a Congressional Session discussing the Ku Klux Klan Act then Representative Lowe stated:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice.

[44] Act of April 20, 1871, c. 22, § 1, 17 Stat. 13, Rev. Stat. § 1979.
[45] John P. Collins, *Has All Heck Broken Loose? Examining Heck's Favorable Termination Requirement in the Second Circuit After Poventund v. City of New York*, 42 Fordham Urb. L.J. 451, 456 (2014) (summarizing, 42 U.S.C. § 1983 (2012)).
[46] 42 U.S.C. § 1983 (2023).
[47] Mitchum v. Foster, 407 U.S. 225, 240 (1972).

> Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress.[48]

I take the time to emphasize the history of § 1983 to show just how important this statute is. But also, because the history of the statute is another part of what creates tension when it comes to habeas procedure. While § 1983 interjects federal courts between the state and the people in order to protect federal rights, habeas procedure is all about first giving deference to the state to correct its own mistakes.[49] Some cynical readers might say, so what if a prisoner loses their § 1983 claims, can't they still sue in a civil tort action in violation of state law? Sure.

But there are numerous reasons why this would be both unjust and creates obstacles in practice. When one's federal constitutional rights are violated by their state, particularly when they are violated in a way which is racialized, they ought to be entitled to their § 1983 remedy for that harm. Because of the racialization of mass incarceration, over-detention cases subsequently mirror those racial disparities.[50] Furthermore, awards in § 1983 suits are typically much higher in federal court than state court and are much more likely to be paid quickly; which means plaintiffs will have a much easier time finding representation for their case if they are able to file a § 1983 suit.[51] This is doubly important because many over detention cases are for less than a week, which means that on their own just a state tort claim is not likely to result in a big enough fee to attract many attorneys to the case.[52] Practically speaking having § 1983 for an

[48] Cong. Globe, 42nd Cong., 1st Sess., 375 (1871).
[49] *See infra* **Error! Reference source not found.**
[50] Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POLICY INITIATIVE, (Jul. 27, 2020) https://www.prisonpolicy.org/blog/2020/07/27/disparities/.
[51] Telephone Interview with William Most, Name Partner, Most & Associates (Feb. 23, 2023) (Mr. Most has handled many of the over-detention lawsuits in New Orleans).
[52] *Id.*

over-detention case could be a determinative factor in whether or someone whose been over-detained can ever get their day in court.[53]

D. Habeas and § 2254

A writ of habeas corpus is employed to bring someone before court, "most frequently to ensure that the that the person's imprisonment or detention is illegal."[54] While initially the original view of habeas corpus was merely a jurisdictional inquiry of the committing court it eventually involved into a remedy for discharge from confinement contrary to the Constitution.[55] 28 U.S.C. § 2254 is the federal statute allowing state prisoners to seek federal relief in federal courts.[56] There are two major pillars of § 2254 that make accessing relief more difficult than it is under § 1983. The first is that, as previously mentioned, § 2254 requires that a prisoner exhaust state remedies for their claim before seeking federal habeas relief.[57] In other words, there is no direct access to federal courts as there is with § 1983 and significant deference is still given to the states. The second, is that habeas corpus is typically only an available remedy to prisoners who are still in custody.[58] Once someone is out of custody, they lose habeas as a remedy. Even if someone filed a habeas petition while they are in custody, if their claim hasn't been heard by the time they get out of custody then then the issue is generally held as moot.[59]

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[53] *Id.*
[54] BLACK'S LAW DICTIONARY (11th ed. 2019).
[55] Preiser v. Rodriguez, 411 U.S. 477, 485 (1973) (citing Ex parte Kearney, 7 Wheat. 38, 5 L.Ed. 391 (1822); Ex parte Lange, 18 Wall. 163, 21 L.Ed. 872 (1874)).
[56] 28 U.S.C. § 2254 (2023).
[57] *Id.*
[58] 28 U.S.C. § 2241 (2023) (stating that a writ of habeas corpus shall not extend to a prisoner unless "he is in custody in violation of the Constitution or laws or treaties of the United States.").
[59] [Not exactly sure how to cite. Could do an *Eg* to a case which does this but don't know if that would be enough?]

II. Doctrinal Precedent

Now that we have the key concepts at hand, this section synthesizes the *Heck* doctrine that will be at play. It will do so both by delving into the cases which came before, but were crucially foundational, to *Heck*; and by highlighting the important cases that came after. The doctrine can be dense and tricky, but this section will illuminate core principles to guide the reader later on when we begin to analyze how the doctrine is being applied.

A. Pre-*Heck*: The Court Takes Its First Steps Blocking § 1983 Prisoner Litigation Suits

1. *Preiser v. Rodriguez* (1973)

In *Preiser v. Rodriguez*, a group of inmates alleged that the New York State Department of Correctional Services wrongly deprived them of their good-time credits as a result of an unconstitutional disciplinary hearings.[60] Looking to remedy their constitutional injuries the inmates filed a suit in federal district court under the Civil Rights Act, 42 U.S.C. § 1983, seeking purely injunctive relief to compel restoration of their lost good-time credits.[61] If successful, the compelled restoration of their credits would have resulted in the immediate release of the inmates.[62] The central question of this case was whether the inmates had properly sued under the Civil Rights Act, given that the inmates could have sought their restoration of credits through a habeas corpus proceeding.[63]

The court of appeals, in an *en banc* rehearing, affirmed the district court ruling in favor of the inmates.[64] They did so based on the Supreme Court's holding in *Wilwording v. Swenson* that

[60] Preiser v. Rodriguez, 411 U.S. 477, 477 (1973).
[61] *Id*.
[62] *Id*.
[62] *Id*.
[63] *Id*.
[64] *Id*. at 482.

"complaints of state prisoners relating to the conditions of their confinement were cognizable either in federal habeas corpus or under the Civil Rights Act, and that as civil rights actions they were not subject to any requirement of exhaustion of state remedies."[65] If one could circumnavigate state habeas with claims about conditions of confinement, then why should they not also be able to circumnavigate state habeas if their due process rights were violated because of improper procedure? The issue seems closely enough related to conditions of confinement.

The Court held that in terms of an injunctive suit seeking restoration of good-time credits, habeas corpus was the proper route for a suit of this sort and therefore state habeas proceedings must be exhausted before gaining entrance into federal court.[66] The Court reasoned that since the suit would directly affect the length and conditions of one's confinement it must be properly brought under habeas.[67] As for the matter of a damages suit, however, the Court found this to be a horse of a different color.

One of the primary arguments raised by the inmates was that if the Court confined them to habeas corpus, that prisoners could be deprived of any damages they would be entitled to for their mistreatment.[68] Because damages are not available in federal habeas, and are unavailable in state habeas most times as well, if habeas were to be the sole remedy then a prisoner could never receive damages because later federal civil rights suits for damages could be barred by res judicata.[69] In many ways, the Court agreed with this contention. Writing, "If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement . . . a damages action could be brought under the Civil Rights Act in federal court without any

[65] *Id*. (citing Wilwording v. Swenson, 404 U.S. 249, (1971)).
[66] *Id*. at 491.
[67] *Id*. at 490-91.
[68] *Id*. at 493.
[69] *Id*. at 493-94.

requirements of prior exhaustion of state remedies."[70] The Court, therefore, separated the paths available for damages and injunctive claims to getting into federal court.[71]

To demonstrate how this could work in practice, imagine a state prisoner who, as a result of a disciplinary hearing, was sentenced to solitary confinement. The prisoner could bring a § 1983 suit in federal court seeking injunctive relief and damages for the unconstitutional disciplinary hearing resulting in such a punishment and damages for his cruel conditions of punishment. However, if that same disciplinary hearing also took away good-time credits, then the prisoner could add the damages claim for those credits to his § 1983 federal court claim, but would have to simultaneously litigate their injunctive relief in state habeas.[72] *Preiser* articulated that prisoners could bring § 1983 claims to challenge the conditions of their confinement and for damages, but that any claims seeking immediate or speedier release by challenging the fact or duration of their conferment must go through habeas corpus.

2. *Wolff v. McDonnell* (1974)

Almost one year after *Preiser*, a class of inmates in Nebraska filed a § 1983 suit challenging numerous practices and regulations of the state Penal and Correctional Complex, one of the claims involved the loss of good-time credits.[73] The plaintiff sought "(1) restoration of good time; (2) submission of a plan by the prison authorities for a hearing procedure . . . which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures."[74] The Court of Appeals held that *Preiser* barred the injunctive claim asking for restoration of good-time

[70] *Id*. at 494.
[71] I also find it to be worth noting that the petitioners in this case also conceded that a § 1983 suit seeking only damages would have been allowed in federal court without state exhaustion requirements. *See*, *Id*. at 494. (dissent)
[72] *See*, *Id*. at 508, 510-11. (dissent)
[73] Wolff v. McDonnell, 418 U.S. 541, 542 (1974).
[74] *Id*. at 553.

credits.[75] But in addition to finding for the damages claim the court also issued declaratory relief ordering expunged from the prisoner's record any findings of misconduct resulting from the proceedings which failed to comply with due process.[76]

The Supreme Court affirmed the Court of Appeals' holding that *Preiser* barred the restoration of good-time in a § 1983 suit, but allowed the damages claim to proceed.[77] The Supreme Court held that the damages claim was properly brought despite that fact that it "required determination of the validity of the procedures employed for imposing sanctions, including loss of good time."[78] And affirmed that this declaratory judgment, as predicate to a damages award, was not barred.[79] In fact, the Court took this holding further and clarified that *Preiser* **only** foreclosed injunction suits restoring good-time credits, and that it did not preclude injunctions "enjoining the prospective enforcement of invalid prison regulations."[80] This holding means that by the time a case was heard in a state habeas proceeding on the restoration of good-time credits, there could already be a federal court ruling that the procedures used during the hearing that took away the credits lacked due process.

Prior to *Heck* some of the key questions that remained were: (1) whether the § 1983 versus habeas issue should be resolved based on the nature of a prisoner's claim, the specific relief requested, or both; (2) whether § 1983 can be used to attack a conviction of someone who is out of custody and therefore cannot utilize habeas; and (3) whether and in what instances

[75] *Id*. at 544.
[76] *Id*.
[77] *Id*. at 554.
[78] *Id*.
[79] *Id*. at 555.
[80] *Id*.

§ 1983 and habeas corpus might both be available.[81] The first question was answered a little over two decades after the decision in this case[82], while the last two are still active legal issues today.

B. *Heck v. Humphrey*: Establishing the *Heck* Bar

For the purposes of this Note, *Preiser* and *Wolff* are the relevant pre-*Heck* legal landscape showing the ways that § 2254 habeas and § 1983 civil rights suits have interacted in prisoners' rights litigation. *Heck vs. Humphrey* is not a good-time credit or over-detention suit; but instead involves a much more traditional habeas claim challenging unlawful acts of law enforcement which lead to Mr. Heck's conviction.[83] In his suit, Mr. Heck sought damages, but did not seek to be released from custody or injunctive relief.[84]

The majority begins their analysis by stating that the holding of *Preiser* does not cover the case of Mr. Heck because Mr. Heck is not seeking speedier release.[85] Acknowledging, however, that *Preiser* stated that damage suits could be brought under § 1983 the Court distinguished *Preiser*.[86] Writing, "[t]hat statement **may** not be true, however, when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction. In that situation, the claimant *can* be said to be 'attacking . . . the fact or length of . . . confinement.'"[87] The problem the Court is getting at here, is that if a prisoner can bring a damages claim in federal court which demonstrates the invalidity of their conviction, then this could create judicial inconsistency between their civil suit outcome and their criminal conviction. Therefore, the

[81] Schwartz, The *Preiser* Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners 37 DEPAUL L. REV. 85, 123-27 (1988).
[82] *See infra* Section II.C.1.
[83] Heck v. Humphrey, 512 U.S. 477, 477 (1994).
[84] *Id*.
[85] *Id*. at 481.
[86] *Id*.
[87] *Id*. at 481-2 (citing *Preiser*, 477 U.S. at 490)(emphasis added)).

Court states *Preiser* would be an "unreliable, if not unintelligible, guide: that opinion had no cause to address, and did not carefully consider, the damages question before us today."[88]

To be clear, in *Preiser* the Court certainly considered the oddity of allowing for simultaneous litigation of good-time credit claims as this is what the Court explicitly allowed in their ruling. This is true despite the fact that doing so inherently created questions of res judicata.[89] But the *Heck* court distinguishes *Preiser* by pointing out that a good-time credit claim is not the same as one attacking the validity of one's conviction. And that claims challenging the very fact of one's conviction lie squarely in the realm of habeas corpus.[90]

The Court also discusses *Wolff,* but distinguishes this case as well by claiming that the damages in *Wolff* were for the "damages for the deprivation of civil rights" due to unconstitutional procedure in a disciplinary hearing and not for the actual deprivation of good time-credits.[91]

The Court held that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applied to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement."[92] And therefore, "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated ."[93] I quote at great length here, because the fundamental question that the rest of this Note will be grappling

[88] *Id*. at 482.
[89] *Preiser*, 477 U.S. at 511-12. (dissent)
[90] *Heck*, 512 U.S. at 482.
[91] *Id*.
[92] *Id*. at 486.
[93] *Id*. at 486.

with is in what ways over-detention, and to some extent good-time credit, cases do or do not fit within this framework.

If a district court were to find that the success of a plaintiff's § 1983 claim would not "demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed."[94] Finally, it's important to note that 'any criminal judgment' includes judgments made in disciplinary hearings after someone has already been convicted and is in jail or prison.

C. Post-*Heck*: Defining and Narrowing the Scope of Eligible § 1983 Claims in Prisoner Rights Litigation

1. *Edwards v. Balisok* (1997)

Here again, we begin with a case where a state prisoner lost good-time credit due to a disciplinary hearing.[95] Mr. Balisok alleged that his due process rights were violated and filed a § 1983 suit seeking (1) declaratory relief that the procedures were unconstitutional, (2) compensatory and punitive damages for the use of the procedures, and (3) an injunction to prevent future violations.[96] The federal district court applied *Heck* and held that a judgment in Mr. Balisok's favor would "necessarily imply the invalidity of the disciplinary hearing and resulting sanctions."[97] The Court of Appeals, however, reversed stating that "a claim challenging only the procedure employed in a disciplinary hearing is always cognizable under § 1983."[98]

The Court acknowledged that the major difference between Mr. Balisok's suit was that unlike Mr. Heck, Mr. Balisok "limited his request to damages for depriving him of good-time

[94] *Id*.
[95] Edwards v. Balisok, 520 U.S. 641, 641 (1997).
[96] *Id*.
[97] *Id*. at 644.
[98] *Id*.

credits *without due process*, not for depriving him of good-time credits *undeservedly* as a substantive matter."[99] This seems to align Mr. Balisok's case with that of Mr. Wolff in making arguments about wrongful procedure as opposed to wrongful deprivation of good-time credits. However, the Court holds that a claim challenging unconstitutional procedures in a disciplinary hearing is not **always** cognizable under § 1983.[100] Instead, the Court emphasized that the procedural claim itself must not necessarily imply the validity of the criminal judgment.[101] In this case, Mr. Balisok claimed that he was denied the opportunity to call witnesses and who had exculpatory evidence and that the reason he was not allowed to do so was because of the deceit and bias that the hearing officer had against him.[102] The Court therefore holds Mr. Balisok's declaratory and damages claims to be incognizable under § 1983 specifically because his allegations "based on deceit and bias on the part of the decisionmaker . . . necessarily imply the invalidity of the punishment imposed."[103]

As for Mr. Balisok's request for injunctive relief that prison officials time-stamp witness statements, the Court found that this claim would not imply the invalidity of good-time credits but remanded on standing issues.[104] The odd dynamic that this decision sets up is that the more egregious one's procedural error is, the less likely they are to be able to have a cognizable claim under § 1983. Because the worse the procedural error, the more likely it will imply the judgment was invalid. Practically speaking, this is an especially tricky holding given that many of these cases are filed *pro se*. One with the required legal knowledge may be able to easily think of numerous ways to strategically craft claims to minimize the damage of a procedural error.

[99] *Id*. at 645.
[100] *Id*.
[101] *Id*.
[102] *Id*. at 647.
[103] *Id*. at 648.
[104] *Id*. at 648-49

Whereas without this knowledge, it would be easy for someone to think that they should maximize the amount of harm they faced in the misguided hope of gaining sympathy from the courts.

2. *Muhammad v. Close* (2004)

Muhammad v. Close is a per curiam opinion by the Court which gives a fully fleshed out synthesis of basic *Heck* doctrine.[105] In other words, there have been cases since which build upon the doctrine in nuanced ways, but given the nature of this being a per curiam decision the case very much reads as a summary of the core doctrine.

In this case, Mr. Mohammad filed a § 1983 suit seeking "$10,000 in compensatory and punitive damages 'for the physical, mental and emotional injuries sustained' during the six days of prehearing detention mandated by the charge of threatening behavior."[106] The Court corrected the Court of Appeals' assumption that *Heck* categorically barred claims which challenged prison disciplinary proceedings; clarifying that while these disciplinary hearings have the potential to affect the duration of one's confinement, they do not necessarily do so.[107] However not only was Mr. Muhammad not challenging any disciplinary hearing procedures, but the state Magistrate Judge in this case found there to be no revocation of good-time credits anyways.[108] The Court unanimously found that *Heck* did not bar a claim of this sort, and the case was remanded.[109]

Key points in the doctrine were reiterated in reaching this conclusion. While the Court begins by stating that "[c]hallenges to the validity of **any** confinement or to particulars affecting its duration are the province of habeas corpus" the Court later narrows this and continues,

[105] *See*, Muhammad v. Close, 540 U.S. 749, (2004) (per curiam).
[106] *Id*. at 753.
[107] *Id*. at 754.
[108] *Id*.
[109] *Id*. at 755.

"*Heck's* requirement to resort to state litigation and federal habeas before § 1983 is **not**, however, implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence."[110] The Court also acknowledges the existence and validity of "hybrids" where a prisoner may seek relief that is unavailable in habeas, namely damages, while also being a valid habeas claims.[111] Finally, in the first footnote of the opinion the Court writes, "[t]he assumption is that the incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction, **not** special disciplinary confinement for infraction of prison rules."[112] In my research and to my knowledge, this is the first time that the Court announced that it is the incarceration ordered by the original conviction that applies to *Heck*.

3. *Wilkinson v. Dotson* (2005)

In *Wilkinson v. Dotson*, two state prisoners brought § 1983 claims challenging the constitutionality of Ohio's parole procedures and seek declaratory and injunctive relief.[113] Both plaintiffs were still incarcerated at the time of the suit, and had both been denied parole at a recent hearing.[114] *Wilkinson* is unique compared to many of the prior cases because of it being a parole and not good-time credit challenge. The declaratory relief being sought was for new parole hearings.[115] Ohio argued that the plaintiffs were only attacking their parole hearings in hopes that it would lead to speedier release from prison and that, therefore, their lawsuits are collaterally attacking the duration of their confinement and must go through habeas.[116] The Court, however, held that this connection between parole proceedings and "release from

[110] *Id*. at 749, 751.
[111] *Id*. at 750-51.
[112] *Id*. at 751 n.1.
[113] Wilkinson v. Dotson, 544 U.S. 74, 76 (2005).
[114] *Id*.
[115] *Id*. at 77.
[116] *Id*. at 78.

confinement" was "too tenuous" to invoke the *Heck* bar.[117] In their decision the Court focuses on the permissibility of § 1983 procedural challenges while contrasting them with § 1983 claim that attempt to seek "immediate or speedier release for the prisoner."[118] In *Wilkinson* plaintiffs' claims challenge state procedures without any request of speedier release and the Court held that the *Heck* bar did not apply.[119]

III. Identifying the Problems with *Heck* and Why Over-Detention Cases Are So Complicated

Now that we've analyzed the key players and synthesized the doctrine, this Section ties them together by situating what has already been discussed about *Heck* doctrine in the literature, and explaining why over-detention cases in particular pose a problem for *Heck*.

A. The Problem of *Heck*'s Favorable Termination and Custodial Status

The area of *Heck* doctrine which has certainly been written about, but is largely not the focus of this Note, is the favorable termination rule.[120] If the core of *Heck* doctrine is that "a judgment in favor of the plaintiff [that] would necessarily imply the invalidity of his conviction or sentence" must first be successfully ruled on in a habeas proceedings before a § 1983 suit can be filed; does this mean that for those cases no § 1983 suit can be brought even if habeas relief is no longer available as an option? Taken literally it would seem that this should be the case. If *Heck* says that a claim must go through habeas before being eligible to be a § 1983 claim, then if habeas is not available, § 1983 claims shouldn't be either. This, however, would leave former

[117] *Id*.
[118] *Id*. at 81.
[119] *Id*. at 82.
[120] *See* Amy Howe, *Justices to Take Up "Favorable Termination" Rule*, SCOTUSBLOG (Mar. 8, 2021, 12:38 PM), https://www.scotusblog.com/2021/03/justices-to-take-up-favorable-termination-rule/; Note *Defining the Reach of* Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, (2008); John P. Collins, *Has All Heck Broken Loose? Examining Heck's Favorable Termination Requirement in the Second Circuit After Poventund v. City of New York*, 42 FORDHAM URB. L.J. 451 (2014).

prisoners who had their constitutional rights violated with no federal remedy.[121] The Supreme Court has been, and remains to be, silent on the matter while the circuit courts have split.[122] Many have held that a prisoner who is still presently in custody, but ineligible for habeas, is barred by *Heck* from bringing a § 1983 suit.[123] Other circuits, have held that all prisoners ineligible for habeas relief are still allowed to bring a § 1983 suit for damages.[124] There's even more of a split on whether or not pretrial diversion programs, which allows the accused to avoid a conviction, triggers the *Heck* bar.[125]

In *Spencer v. Kemna* five justices supported the idea that when habeas was not available because one was no longer in custody, that the *Heck* bar did not apply and a § 1983 suit could be brought.[126] The problem is that the five justices did not neatly do so in one majority opinion, but instead did so through two concurring opinions and one dissent.[127] I do not bring this up merely to discuss another problem with *Heck* that is not the main focus of this Note. But instead, as we examine over-detention and good-time cases there are times where favorable termination will play a part in the courts' reasoning. This issue of favorable termination on the whole still remains largely unsettled. Where the information is available, I will discuss favorable information as it is relevant specifically to over-detention and good-time cases. Otherwise, it will remain as an unsettled area of the law which is beyond the scope of this Note.

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[121] *Defining the Reach of Heck*, HARV. L. REV. at 869.
[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] Josh Cayetano, *What the Heck: Favorable Termination and the Narrowing of § 1983 Liability*, BERKELEY J. OF CRIM. L. (2023).
[126] John P. Collins, *Has All Heck Broken Loose?*, 42 FORDHAM URB. L.J. at 462-63 (citing Spencer v. Kemna, 523 U.S. 1, 18, 20 (1998).
[127] *Id*.

B. Over Detention & Good-Time Credits

So why do over-detention cases and good-time cases pose particularly problematic under *Heck*? Nancy King and Suzanna Sherry begin to answer this question in their 2008 article on habeas and sentencing reform.[128] They point out that much of habeas law proceeds on the assumption that the state prisoner seeking habeas review is doing so by alleging a constitutional error in the *decision* that led to their incarceration.[129] Elaborating that "[h]abeas is considered collateral review precisely because it reviews state court judgments that have already been subjected to direct review."[130] This isn't true of over-detention and good-time claims though. These claims attack the administrative actions of state prison officials and take place after one's conviction and sentencing has occurred. Through their analysis of thousands of cases they could find "no reason to believe that the win rate for inmates challenging sentence-administration decisions is any greater than the rate for prisoners challenging the legality of their original convictions and sentences."[131] This is odd. There is much less process and significantly lower standards involved in prison administrative decision making. Suggesting that something is going on that's making it difficult for prisoners to bring successful claims challenging prison administrative action. This could be because the language of AEDPA, which is already a nightmare to navigate, does not clearly map onto claims of administrative incorrectness by prison officials.[132] Another reason, however, is simply that the Supreme Court has taken up relatively few cases involving these types of prison administrative errors.

[128] Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 DUKE L.J. 1 (2008).
[129] *Id*. at 2.
[130] *Id*.
[131] *Id*. at 20.
[132] *Id*. at 35.

When it comes to over-detention cases there is a lack of a Supreme Court case directly resolving the issue, so the lower courts are left up to their own devices. They must determine whether over-detention claims, which certainly challenge one's confinement but much less clearly attack one's sentence or conviction, should be barred by *Heck*. Part IV begins to delve into the wonky and inconsistent ways in which the lower courts have been applying *Heck*. One throughline throughout the cases the courts have been grappling with, however, is the difference between claims challenging state judicial action and claims challenging prison administrative action.

IV. Circuit Court Sampling: Habeas, *Heck*, and § 1983 Collide

While many Circuit courts have heard over-detention cases, most have not directly confronted the issue of whether and in what circumstances *Heck* bars § 1983 claims for over-detention. The circuits that have addressed it, however, have come to very different results. I have categorized the courts into four different main groups: strong *Heck* bar courts, threshold test courts, courts in conflict, and weak *Heck* bar courts. The strong *Heck* bar courts are courts which are rigidly enforcing the *Heck* bar against § 1983 over-detention claims, the threshold test courts are courts which may have some slightly different results but seem to be developing some sort of threshold test for when *Heck* applies, the courts in conflict section discusses courts which directly conflict with one another, and the weak *Heck* bar courts are those which apply the *Heck* bar in a more flexible and less frequent way to § 1983 over-detention suits.

A. Strong *Heck* Bar Courts

1. The Eleventh Circuit

In *Ballard v. Morales* the Eleventh Circuit, in a per curiam opinion, held that Ballard's claim of over-detention and request for immediate release was barred by *Preiser* and *Heck*.[133] The court simply stated that because Ballard was seeking immediate release, a § 1983 claim was improper under *Preiser* and state habeas was required.[134] It is notable that the court engaged in no analysis of whether or how this claim was attacking the invalidity of Ballard's conviction or sentence. The court then continued that Ballard's damages claim was barred by *Heck* because if Ballard were to prevail on the damages claim, it would implicate Ballard's current sentence as invalid.[135] Again the court does not explain why a claim about being held past one's maximum release date wound imply one's sentence to be invalid. There is also no discussion or analysis on whether this might be the type of claim where money damages are available even when equitable relief is not. The court does take care to discuss the weak merits of Ballard's case and the unlikelihood of success, however, ultimately the holding of the case is that the claim fails because it is barred by *Heck*.[136] Meaning that in the Eleventh Circuit, if you are in custody and have an over-detention claim you **must** first seek habeas relief.

It's also notable that Ballard was in custody when filing his § 1983 claim.[137] This is relevant because the Eleventh Circuit allows § 1983 claims for over-detention to proceed if the claimant is out of custody, even if they never filed a habeas petition while in custody.[138] How

[133] Ballard v. Morales, No. 21-13881, slip op. at 4 (11th Cir. Sept. 26, 2022) (per curiam).
[134] *Id*.
[135] *Id*.
[136] *Id*. at 5.
[137] *Id*. at 2.
[138] *E.g.*, Sosa v. Martin County, Florida, 13 F.4th 1254, 1266 (11th Cir. 2021); Powell v. Barrett, 256 Fed.Appx. 615, 617 (11th Cir. 2007).

often these suits are successful go beyond the scope of this Note, but these cases are not being barred on the basis of *Heck* or *Heck*'s favorable termination requirements.[139]

2. The Ninth Circuit

One recent case out of the Northern District of California discusses *Heck* and over-detention.[140] In *Aguirre v. Ducart*, the plaintiff argues that the correctional facility denied them the right to earn good-time credits, and that therefore they were over-detained for around sixteen months.[141] The court wrote, citing *Heck*, that "[i]n order to recover damages for an allegedly unconstitutional imprisonment, a plaintiff bringing a Section 1983 claim must prove that the underlying conviction or sentence has been . . . called into question by a federal court's issuance of a writ of habeas corpus."[142] Heavily citing *Wilkinson*, the federal court held that *Heck* barred Mr. Aguirre's suit.[143] The court held that in order to file a § 1983 claim Mr. Aguirre needed to have either already had his sentence invalidated or had to show that he immediately pursued relief after the incident giving rise to his claims.[144] In this way this courts holding is similar to the Eleventh Circuit's application of the *Heck* bar to over-detention cases, but may even go a little further than the eleventh circuit because Mr. Aguirre was out of custody when filing his suit.[145] Meaning that habeas was no longer available to him as a remedy and a § 1983 suit was one of the only ways he could have sought relief. The Ninth Circuit has held that in cases where the *Heck* bar would otherwise apply if one were in custody, one must show that they tried to

[139] *Id*. (showing, that while ultimately the § 1983 claims were both unsuccessful on the merits, former prisoners were able to bring § 1983 claims for over-detention when out of custody).
[140] Simmons v. California Corr. Health Care Servs., No. 20-CV-09282-EMC, 2023 WL 2456788, at *1 (N.D. Cal. Mar. 9, 2023); Aguirre v. Ducart, No. 17-CV-06898-YGR, 2019 WL 1516467, at *4 (N.D. Cal. Apr. 8, 2019).
[141] *Aguirre*, at *4.
[142] *Id*.
[143] *Id*.
[144] *Id*. at 5.
[145] *Id*.

immediately pursue habeas when it was available to them.[146] In other words, this federal court ruling out of Northern California has an even more restrictive *Heck* bar because those out of custody seeking to file an over-detention claim would seemingly have neither habeas or § 1983 as a remedy.

I will also briefly mention that in a Federal Torts Claim Act case, so not § 1983, the Ninth Circuit held that *Heck* barred the case because "[s]o long as he was incarcerated, a judgment for damages for the miscalculation would necessarily imply that he was wrongfully imprisoned."[147] This is an Appellate Court ruling which echoes much of what the district court has held in § 1983 cases.

3. The Tenth Circuit

While neither the Tenth Circuit nor the district courts within it have directly addressed the issue of whether *Heck* bars over-detention claims, there have been district court holdings on closely related issues. In *Herrera v. Dorman*, for example, Mr. Herrera argued that he was over-detained because his two sentences were supposed to run concurrently and not consecutively.[148] While not a classic over-detention claim, the court seemed to agree that case precedent suggested that Mr. Herrera's sentences were supposed to run concurrently but nevertheless found that the *Heck* bar applied.[149] *Lozoya v. New Mexico Department of Corrections* is a classic over-detention case, however the court found it did not have enough information to rule on the *Heck* bar issue because the court would need to know more information about Mr. Lozoya's custodial status and diligence in seeking habeas.[150] The things the Court was looking for more information

[146] Nonnette v. Small, 316 F.3d 872, 874-77 (9th Cir. 2002).
[147] Erlin v. U.S., 364 F.3d 1127, 1130 (9th Cir. 2004).
[148] *See* Herrera v. Dorman, No. 13-1176, 2015 WL 13662587, at *1 (D. N.M. Jul. 15, 2015).
[149] *Id.* at 3.
[150] Lozoya v. New Mexico Department of Corrections, No. 14-000167, 2015 WL 13665419, at * 5 (D. N.M. Mar. 5, 2015).

on, however, suggest that they were seeing the issue as one of whether to apply favorable termination, as opposed to questioning whether this over-detention fell within *Heck*'s 'implying the invalidity of one's sentence or conviction' test. While not a solid answer, these are some rulings which infer the courts in this circuit, or at least in New Mexico, would enforce strong *Heck* bar against over-detention claims.

B. The Threshold Test Courts

1. The Fifth Circuit

In *Crittindon v. LeBlanc* former state prisoners filed a § 1983 action against the Department of Public Safety and Corrections for the Department's failure to adopt policies ensuring their timely release and participating in conduct which caused their over-detention beyond the expiration of their sentences.[151] Largely due to a lack of resources and systemic agency inaction, incarcerated folks under the custody of the Department of Public Safety and Corrections were "held months beyond their release dates."[152] The former prisoners filed § 1983 claims against jail officials; however Judge Oldham raised sua sponte in oral argument, and subsequently argued in his dissent, that plaintiffs' § 1983 over-detention claims should be barred by *Heck* and *Edwards*.[153] In his dissenting opinion Judge Oldham wrote, "(A) plaintiffs' claims sound in habeas, so they have no § 1983 claim for damages. And (B) the majority's counterarguments are meritless."[154] The Fifth Circuit, however, ultimately held that the *Heck* bar did not apply here because "[h]ere, the parties agree that Plaintiffs were held in excess of their sentences, and Plaintiffs do not challenge their underlying conviction nor length of their

[151] Crittindon v. LeBlanc, 37 F.4th 177, 183-85 (5th Cir. 2022).
[152] *Id*. at 181-84.
[153] *Id*. at 190.
[154] *Id*. at 192.

sentence."[155] The court also took care to elaborate on the strengths of the merits in plaintiffs' case in their reasoning.

Furthermore, it's noteworthy that *Crittindon* was a case of systemic over-detention where the plaintiffs could point to specific policies which led to their over-detention. On cases involving over-detention due to the miscalculation of one's release date the Fifth Circuit is actively litigating how *Heck* applies. In *Colvin v. LeBlanc* the Fifth Circuit rejected the district court's holding that *Heck* did not bar this claim.[156] Stating that "a § 1983 damages action predicated on the sentence calculation issue is barred by *Heck* because success on that claim would necessarily invalidate the duration of his incarceration."[157]

Soon after *Colvin* one of the lower district courts heard *Hicks*, a similar over-detention via sentence computation error case.[158] However, this lower court found that the aforementioned quote from *Colvin* was dicta, and that even if it wasn't it would not apply to Hicks's case.[159] This lower court reasoned that the sentence-calculation error in *Colvin* would have had the defendant get out thirty years sooner, which differs significantly from Mr. Hicks, who claims he was over-detained for three months when his lawful sentence was served but he was detained anyways.[160] This case is back on appeal at the Fifth Circuit where the *Heck* bar issue will be front and center for the Circuit this upcoming August.[161] And *Hicks* was not the only lower court case to evade *Colvin*. In *Frederick v. LeBlanc* the same district court also held that a sixty day over-detention case via sentence computation error was not barred by *Heck*.[162] The court emphasized that

[155] *Id*. at 190.
[156] Colvin v. LeBlanc, 2 F.4th 494, 499 (5th Cir. 2021).
[157] *Id*.
[158] Hicks v. Dep't. of Public Safety & Corrections, 595 F.Supp.3d 463, 471 (M.D. Louisiana 2022).
[159] *Id.* at 472.
[160] *Id*.
[161] Will need to update as case is heard.
[162] Frederick v. LeBlanc, 563 F.Supp.3d 527, 531 (M.D. Louisiana 2021).

Colvin was more than a "simple case of computation" and stressed that Colvin was alleging both an artificial enhancement of his sentence as well as illegal extradition issues in crafting his claim.[163] While certainly an area of the law that is not settled in the Fifth Circuit, all this seems to suggest that there may be some threshold test that is developing for when over-detention dases are or are not barred by *Heck*.

2. The Second Circuit

Similar to the Seventh Circuit, the most on-point case looking at *Heck* and over-detention has been decided recently in the federal district courts.[164] In *Sowell v. Annuci* Mr. Sowell brought a variety of different § 1983 claims including that he was currently being detained at Riker's Island since his release dates.[165] The district court's ultimate decision was an order to amend granting Mr. Sowell permission to amend some of his claims to comply with pleading standards and clarified which claims Mr. Sowell could amend and what the standards were for those claims.[166] The court specifically suggested that Mr. Sowell provide more information about his over-detention claims, especially evidence about the date and reasons he was entitled to be released.[167] In a footnote, however, the court wrote that "[i]f Plaintiff has not been held beyond a mandated release date, and instead is seeking to challenge the validity or length of his current confinement . . . he must do so in a petition for writ of *habeas corpus*."[168] This footnote suggests another sort of thresh-hold test like what is developing in the district courts in the fifth circuit. That if the incarcerated person is saying they should have already been released, then this claim is not barred by *Heck*. But if, for example, the prisoner is saying that a prison official

[163] *Id.* at 532.
[164] *See also* Sowell v. Annucci, No. 22-CV-6538 (LTS), 2023 WL 208625, at *1 (S.D.N.Y. Jan. 13, 2023).
[165] *Id*. slip op. at 2.
[166] *Id*. slip op. at 1.
[167] *Id*. slip op. at 4.
[168] *Id*. slip op. at fn 7.

miscalculated his sentence and it is still well before the prisoner's argued release date, then habeas is the proper route for these claims.

The order in *Sowell* does seem to pick up off of some of the Second Circuits cases that have indirectly confronted some of the *Heck* over-detention issues.[169] In *Jenkins v. Haubert* the court emphasized in a non-over-detention case that prisoners challenging the "fact or length of confinement" only had habeas for their sole remedy and were barred by *Heck*.[170] Taken literally, over-detention would seem to fall into this group of claims barred by *Heck* because it is literally challenging the fact of one's confinement. However, in a case involving a minor where their mother filed a § 1983 suit arguing that her son had been over-detained for eighty-three days because of a calculation error failing to credit him for time-served, the court held that the *Heck* bar did not apply.[171] Instead the Second Circuit held what they described as the plaintiff's "false imprisonment claim" of being held beyond their statutory release date was not barred by *Heck* because it was not challenging or implying the invalidity of their conviction.[172] This case is actually pretty on point for an over-detention case but there are some differentiating factors. The first is that the court takes great care to elaborate that the plaintiff in *Huang* would have no other remedy if their § 1983 claim was denied because they were no longer eligible for habeas.[173] Meaning that the court's decision could have been based more in light of favorable termination principles as opposed to a true holding on over-detention. The second is that this case involves a juvenile, and while there were no specific arguments laid out about why juvenile status should mean the law is applied differently, one can imagine the different sympathy level at play in this

[169] *See* Jenkins v. Haubert, 179 F.3d 19, (2nd Cir. 1999); Huang v. Johnson, 251 F.3d 65, (2nd Cir. 2001); Peralta v. Vasquez, 467 F.3d 98, (2nd Cir. 2006).
[170] *Jenkins*, 179 F.3d at 24.
[171] *Huang*, 251 F.3d at 67.
[172] *Id*. at 67, 74.
[173] *Id*. at 72-74.

case that may have been a factor in the sort-of threshold determination this court seems to be making.[174]

C. Courts in Conflict

The Third Circuit Court of Appeals has one case directly addressing the *Heck* bar and over-detention[175], but the federal district courts in this circuit have heard more cases on this issue than any other circuit.[176] The plaintiff in *Royal v. Durison* argued that prison officials had miscalculated his time served prior to sentencing resulting in the plaintiff serving a sentence beyond their legal maximum.[177] The similarity lies in the fact that these are both sentence calculation over-detention cases in which plaintiffs claim the error took place pre-sentencing and therefore the error was replicated in their sentencing judgment. The court held both that Mr. Royal's claim that prison officials failed to investigate his calculation error and his Eight Amendment over-detention claim were barred by *Heck*.[178] The court reasoned that even if Mr. Royal's claims were true that he was incarcerated for more than six months longer in excess of the maximum sentence that *Heck* would still bar this claim because the ruling would necessarily be holding Mr. Royal's confinement to be invalid.[179] This would be especially significant since in the Third Circuit *Heck*'s favorable termination rule is impenetrable and unless you have some finding in your favor via habeas, you cannot file a § 1983 suit if your claim would fall under *Heck*. Even if you're out of custody, or even if you filed a habeas suit but did not get a decision

[174] *Id*. at 67.
[175] Nothing that while Deemer v. Beard, 557 Fed.Appx. 162, (3rd Cir. 2014) does discuss *Heck* and over-detention, it does so in a complex scheme of parole violations that involve the plaintiff being in and out of jail. This case is incredibly fact specific and does not address the issues discussed in this Note.
[176] Unsure how to cite, could do a long string cite to all the cases?
[177] Royal v. Durison, 254 Fed.Appx. 163, 164 (3rd Cir. 2007).
[178] *Id*. at 165.
[179] *Id*.

in time before being released.[180] While not determinative, this could suggest that the Third Circuit would lean toward being a *Heck* bar strong court.

But if this is what the Third Circuit was trying to signal, the lower courts did not get the memo. In 2018, the Western District of Pennsylvania held that a § 1983 claim challenging over-detention was not barred by *Heck* because "Plaintiff does not dispute the validity of his conviction or corresponding sentence."[181] Instead the court found that the plaintiff was only challenging the amount of time "*in excess*" of their valid conviction or sentence.[182] In May of 2023, however, the Middle District of Pennsylvania held that § 1983 suits for over-detention claims are barred by *Heck*.[183] The court held this despite the fact that not even one year earlier it held that a § 1983 claim challenging parole officials keeping plaintiff on supervision past the plaintiff's maximum sentence date was not barred by *Heck*.[184] In an earlier 2014 case the Middle District of Pennsylvania also held that a more classic over-detention claim was not barred by *Heck* because the success of the § 1983 would not "demonstrate the invalidity of any outstanding criminal judgment against the plaintiff."[185] As such this is a cluster of courts in conflict. Unlike in the Fifth Circuit lower courts where there seems to be an attempt to create a coherent test, the cases in this Circuit simply have conflicting rulings on this issue.

[180] *Id*.

[181] Griffin v. Alleghany County Prison, No. CV 17-1560, 2018 WL 6413156, at *4 (W.D. Pa. Dec. 6, 2018).

[182] *Id*.

[183] Jewells v. Johnson, No. 3:22-CV-00440, 2023 WL 3328124, at *6 (M.D. Pa. May 9, 2023).

[184] Robertson v. Anglemeyer, No. 1:20-1736, 2022 WL 2318683, at * 2-3 (M.D. Pa. Jun. 27, 2022).

[185] Chappelle v. Varano, No. 4:11-CV-00304, 2014 WL 2808608, at * 4 (M.D. Pa. Jun. 27, 2014).

D. The *Heck* Bar Weak Courts

1. The Seventh Circuit

In the Seventh Circuit the most on point case for this issue comes out of the Northern District of Illinois and was just recently litigated.[186] In *Vernon v. McGlone* Mr. Vernon, a formerly incarcerated person, brought a § 1983 suit against the Vienna Correctional Center where he was over-detained for two and one-half years past his proper release date.[187] Somewhat similar to the facts in *Colvin*, Mr. Vernon's main contention is that he was sentenced to a thirty year term with 1,456 days of time-served credits but that upon his transfer his release date was miscalculated to not include his time-served credits.[188] Mr. Vernon was over detained for 989 days before the calculation error was corrected and he was released, in violation of his Eight Amendment rights.[189]

The Correctional Center argued that Mr. Vernon's claims should have been barred by *Heck*, because during the time he was over-detained Mr. Vernon did not file a habeas claim or seek state court relief.[190] That's because Mr. Vernon's allegations call into question the duration of his confinement, which the Correctional Center argued invoked *Heck*.[191] Mr. Vernon argued that he was challenging neither his conviction nor his sentence, but instead he was challenging the conduct of the prison official whom he tried to inform of the error they made regarding the calculation error.[192] In an opinion by Judge Dianne Woods, the district court agreed with Mr.

[186] Vernon v. McGlone, No. 22 C 4890, 2023 WL 3059154, (N.D. Ill. Apr. 24, 2023).
[187] *Id*., slip op. at 1.
[188] *Id*.
[189] *Id*., slip op. at 2.
[190] *Id*., slip op. at 3.
[191] *Id*. Also note that the Seventh circuit is one in which that applies *Heck*'s favorable termination requirement even if habeas is no longer an available remedy (*See* Savory v. Cannon, 947 F.3d 409, (7th Cir. 2020). Meaning that if *Heck* is held to be applicable to a case it doesn't matter if habeas is no longer available, since the plaintiff should have gone through habeas § 1983 relief is still not available.
[192] *Vernon*, slip op. at 3.

Vernon; holding that a § 1983 suit challenging the misapplication of credits was in no way implying the invalidity of one's conviction or sentence.[193]

If appealed, however, it's questionable what the Seventh Circuit would do. While not having ruled directly on the issue, the Seventh Circuit has ruled on a very similar type of case and came out the other way.[194] In *Beaven v. Roth* Mr. Beaven was sentenced for twelve years and given 97 days time-served credit.[195] Mr. Beaven, however, claimed that the judge erred in only applying 97 days for time-served and that his actual time served up to that point had been 430 days.[196] Mr. Beaven had challenged this in both state post-conviction proceedings and through a petition of writ of habeas corpus.[197] The Seventh Circuit held that his § 1983 suit was barred by *Heck* because, while Mr. Beaven argued that he was challenging the procedures used to deny him his proper time-served credit, the fact that Mr. Beaven was seeking damages for each day he was 'wrongfully imprisoned' revealed that a ruling in his favor would necessarily imply the invalidity of his sentence.[198]

However, there are crucial differences between Mr. Beaven's case and Mr. Vernon's. The first is that the correct sentence handed down by the judge in Mr. Beaven's case was something in contention while in Mr. Vernon's case it was not. In this sense, Mr. Vernon's case looks much more like a classic over-detention case than does Mr. Beaven's. Furthermore, although not discussed in great detail, the fact that Mr. Beaven did attempt to go through habeas with his claim before filing a § 1983 suit could be a notable factor. Because it's almost as if Mr. Beaven had conceded that he too, thought his case was one which was properly heard via a habeas writ

[193] *Id*.
[194] Beaven v. Roth, 74 Fed.Appx. 635, (7th Cir. 2003).
[195] *Id*. at 636.
[196] *Id*. at 636-37.
[197] *Id*. at 637.
[198] *Id*. at 637-38.

but then when the outcome was unsuccessful he recreated the same issue as a § 1983 problem. Which is exactly the kind of maneuvering the Court disapproves of in *Heck* and *Preiser*. While the ruling in *Beaven* may be interpreted to suggest that the Seventh Circuit would apply the *Heck* bar to over-detention cases more generally, this question has yet to be directly answered.

Finally, it's worth noting that the Seventh Circuit has recently certified a class-action lawsuit based on over-detention § 1983 claims; however, *Heck* was not raised as an issue in the opposition of this case.[199]

2. The D.C. Circuit

There is one rather convincing cases in the DC Circuit which suggest that it would fall into the 'easy *Heck* bar' category. The first is a case out of the DC Court of appeals, which while technically not a classic over-detention case, has many of the same underlying principles.[200] In *Taylor* the plaintiff filed a § 1983 suit for his unlawful confinement in the District of Columbia Central Detention Facility because both the federal district court and the local Superior Court had ordered that he be confined at a halfway house.[201] The Court reasons that *Heck* does not apply because the *Heck* bar is "limited to suits that, if successful, would necessarily imply the invalidity of the plaintiff's conviction or sentence" and this suit does not.[202] While the court seems to view the issue as being similar to being in one type of confinement and asking to be moved to another[203], practically speaking this isn't the case. While the plaintiff would be moved to a residential treatment center, the restrictions on the plaintiffs liberty were vastly different between the detention center and the halfway house.[204] Instead of focusing on confinement,

[199] Driver v. Marion County Sheriff, 859 F.3d 489, 495 (7th Cir. 2017).
[200] *See* Taylor v. U.S. Probation Office, 409 F.3d 426, (D.C. Cir. 2005).
[201] *Id*. at 427.
[202] *Id*.
[203] *Id*.
[204] *Id*.

however, the court emphasizes the ways in which the plaintiff's § 1983 claim is not implying the invalidity of their sentence or conviction. If this same reasoning were applied to a classic over-detention case, it would seem that over-detention § 1983 claims would be permissible too. Finally, the D.C. district court has certified § 1983 class actions on over-detention in which *Heck* has not been used to bar the suits.[205] While *Heck* was not raised by defendants in those cases, it could put the district court in an awkward position to later hold that *Heck* should have barred these class actions.

V. *Heck* Doctrine Should Not Bar Most Over-Detention Claims.

A. The Classic Over-Detention Cases

None of the Supreme Court precedent on this issue suggests that *Heck* doctrine should be being used to bar § 1983 claims of classic over-detention cases. These are the cases like Mr. Traweek's.[206] Where someone has gotten their conviction and sentence, but for some reason continue to be detained and incarcerated past the date in their legal sentence. While prison administrative officials are usually given some "reasonable time" to process and effectuate the release of incarcerated folks[207], the amount and frequency that folks are being over-detained is astounding and far surpasses what is reasonable.[208]

The main argument that could be made about why *Heck* should bar over-detention § 1983 claims would be all of the language around "confinement" used from *Preiser* through *Wilkinson*.[209] But this is a superficial, hyper-literal, argument which fails to meaningfully take up

[205] *See e.g., Bynum v. District of Columbia*, 412 F.Supp.2d 73, 74-5 (D.C. Cir. 2006).
[206] Webster & Lane, *supra* note 1.
[207] *See e.g.* Lewis v. O'Grady, 853 F.2d 1366, 1370 (7th Cir. 1988).
[208] Patricia E. Simone, *A Presumptive Constitutional Time Limit for Administrative Overdetention of Inmates Entitles to Release*, 81 NOTRE DAME L. REV. 719, 719-721(2006).
[209] *See supra* Part **Error! Reference source not found.**.

the ways in which Supreme Court precedent uses the word "confinement." First, and most importantly, looking to *Heck*. Yes, *Heck* reasons that those who challenge the "fact or duration of his confinement" must go through habeas.[210] But I assert that this statement, and many similar ones, are being made with the assumption that the plaintiff was challenging their court or administratively imposed sentence. This is similar to how the administrative errors made in classic over-detention cases differ from the administrative procedural challenges the Court disuses in *Wolff* and *Balisok*.[211] In those cases, there was an actual judgment rendered about good-time credits which the plaintiff was challenging and which would have both implied the invalidity of the prior judgment and lead to the speedier release of the plaintiff.

But classic over-detention claims are not doing this. They are not challenging any judgment made either by a court or by prison administrative officials. They are challenging the conduct of prison administrative officials, but are not challenging any judgment. Indeed, the holding of *Heck*, despite language of confinement, is that "a § 1983 plaintiff must prove that the **conviction** or **sentence** has been reversed on direct appeal . . . or called into question by a federal court's issuance of a writ of habeas corpus.[212] Classic over-detention claims challenge nothing about the plaintiff's conviction or sentence. In fact, the whole main argument of a classic over-detention case depends on the legitimacy of both the plaintiff's conviction and sentence. It's arguing that the very legal legitimacy of their sentence is in fact not being called into question by their § 1983 suit, but instead by the carceral administrative agency which is refusing to uphold it by their failure to release the plaintiff.

[210] *Heck*, 512 U.S. at 481.
[211] *See Wolff*, 418 U.S. at 539; *Balisok*, 520 U.S. at 641.
[212] *Heck* at 477 (emphasis added).

Perhaps the *Heck* doctrine case which utilizes the strongest "confinement" language is *Wilkinson*. In *Wilkinson* the Court wrote plaintiffs trying to file § 1983 claims must first go through habeas if they are challenging their confinement "*directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody."[213] This quote from *Wilkinson* is cited in *Aguirre* in the court's rationale for imposing the *Heck* bar on an over-detention suit.[214] But what *Aguirre* failed to mention was the first part of this sentence in *Wilkinson*. Which states that "[t]hroughout the legal journey from *Preiser* to *Balisok,* the Court has focused on the need to ensure that state prisoners use only habeas corpus . . . remedies when they seek to invalidate the duration of confinement."[215] Meaning that even in *Wilkinson* which seems to put the most direct emphasis on confinement, the Court elucidates that it's confinement in regards to when a plaintiff is seeking to invalidate the duration of their confinement. The legal duration of the plaintiff's confinement has passed. Instead the plaintiff is challenging their prolonged confinement as a result of administrative error or negligence. Even in *Wilkinson* the Court wrote "where the § 1983 action 'even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment . . . the action should be allowed to proceed.'"[216]

None of the *Heck* doctrine cases contemplate these classic over-detention cases. It's impossible to explain with clairvoyance why some courts have been applying *Heck* to § 1983 over-detention suits. But one thing which may be adding confusion to the situation is the fact that there are many courts which hold false imprisonment and false arrest to be the same. Indeed, in *Sowell* the Second Circuit took care to mention their law holds false imprisonment and false

[213] *Wilkinson,* 544 U.S. at 81.
[214] *Aguirre* at *4.
[215] *Wilkinson,* at 81.
[216] *Id*. at 80 (citing *Heck* at 487).

arrest indistinguishable.[217] This could be truly problematic as over-detention could accurately be described as a matter of false imprisonment but not one of false arrest.

Historically speaking in common law there are distinctions between false arrest and false imprisonment.[218] In common law false imprisonment is both a tort and a crime.[219] While one could challenge their false imprisonment via a writ of habeas corpus[220], one could also sue for damages under a common-law action of trespass.[221] The two were not mutually exclusive. Furthermore, the "original" view of a habeas corpus attack upon detention under a judicial order was a limited one. The relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction."[222] Suggesting that the original habeas question was solely about whether or not one had been validly sentenced or convicted by a judge who had jurisdiction over them. However, habeas expanded to be able to affect discharge from "any confinement contrary to the Constitution."[223] Despite the fact that habeas corpus and common law civil tort actions were historical remedies available for over-detention, nothing about this precludes § 1983 suite from being another vehicle by which over-detention claims can be colorable. The fact that one could file a civil tort suit for their false imprisonment claim upon their release even if they had not ever sought habeas relief, is notable. Finally, it is well established that although claims may be cognizable in habeas corpus, the same claim could "also be read to plead causes of action under the Civil Rights Act, 42 U.S.C.s § 1983."[224] Which

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[217] *Sowell*, slip op. at fn 8.
[218] *See* MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS 56-62 (1st ed. 1892); CHARLES A. WEISMAN, A TREATISE ON ARREST AND FALSE IMPRISONMENT 3-7, 32-38, (3rd ed., 2004).
[219] WEISMAN, *supra* note 218, at 2 (citing Kroeger v. Passmore, 93 Pac. 805, 807 (1908); McBeath v. Campbell, 12 S.W.2d 118,122 (Tex. 1929)).
[220] NEWELL, *supra* note 218, at 65-66 (citing Warne v. Constant, 4 Johns. (N.Y.), 32 (1809)).
[221] *Id*. at 88, 101.
[222] *Preiser*, 411 U.S. at 486 (citing Ex parte Kearney, 7 Wheat. 38, 5 L.Ed. 391 (1822)).
[223] *Id*. (citing Ex parte Lange, 18 Wall. 163, 21 L.Ed. 89 (1885).
[224] Wilwording v. Swenson, 404 U.S. 249, 251 (1971).

means that the ultimate question is not whether over-detention claims are cognizable under habeas, but whether over-detention claims challenge the legality of one's conviction, and therefore the sole remedy available, at first, is habeas.

Over-detention claims resoundingly do not challenge the legality of one's conviction. Rather, they depend on it. As such classic over-detention § 1983 claims such as this should never be barred by *Heck*.

B. The Mushy Cases: Is There a Valid Judgment?

Over-detention claims, however, come in many different colors, shapes, and sizes. Many of the cases which have been discussed have involved some type of calculation error, which is somewhat different from having a legal sentence release date that is simply not being enforced (like in a classic over-detention case). Calculation errors can occur for a number of reasons. Sometimes it's simple administrative error.[225] Time calculations are governed by very specific rules with many factors and even different 'types' of time (ie. good-time credits, time-served credits, street-credits). Meaning that a mere administrative error is a ready possibility. Other times, however, plaintiffs claim intentional calculation errors by a distinct prison official or administrator which can feel distinctly different.[226] And other times plaintiffs complain of not a wrong calculation of their release date but a failure to calculate time-credits that they may have received from a different institution. All of this feels a lot mushier because some of these claims can start to look similar to the procedural error claims discussed in cases like *Wolff, Balisok*, and *Close*.

While figuring out the answers to all of this mushiness is beyond the scope of this Note, I argue that there is one good guiding rule revealed from this doctrine which can help one navigate

[225] *See Crittindon* at 183-85.
[226] *See Balisok* at 647.

the mess. Which is first to look to see if there was a judgment on the matter in question, and then to see whether the plaintiff's suit is arguing that judgment to be valid or invalid. The Seventh Circuit cases discussed in this Note provide a good example of the ways in which this rule could be useful and potentially help synthesize the doctrine. In *Vernon* the plaintiff argued that detention center officials has miscalculated his sentence because they failed to apply his time-served credits, which were applied at the plaintiff's sentencing.[227] Here, Mr. Vernon agrees with his valid judgment and sentence, but is alleging that detention center officials are failing to properly follow those sentencing guidelines.[228] As such, *Heck* should not bar these types of over-detention claims. While not as clear cut as the classic over-detention cases, it is a case which has a valid sentencing judgment, which due to some type of error is not being applied. The consequence is not a speedier release, just an accurate one.

However, compare this with *Beaven* where the plaintiff alleged that the judge had errored in their final sentencing judgment by not applying certain good-time credits.[229] In this case the plaintiff is holding the sentencing judgment to be invalid and therefore seems to be more challenging the substantive length of a sentence and attacking his conviction that in the case of Mr. Vernon. In this way, looking to whether the plaintiff is embracing or challenging the judgment on their sentence could be a useful factor in determining whether the *Heck* bar should apply.

In regards to the sort-of threshold tests that some of the courts seem to be leaning towards, I assert that they don't make any sense. In the Fifth Circuit, for example, the courts viewed the claims of Mr. Hicks and Mr. Colvin as being so wildly different because Mr. Hicks

[227] *Vernon* at 2-3.
[228] *Id*.
[229] *Beaven* at 636.

was already being over-detained, whereas Mr. Colvin had a sentence calculation error claim which if correct would have given him thirty years good-time credit.[230] While the factual differences in these two cases may be stark, the amount of time alone or the fact that one is a classic over-detention case whereas the other is a sentence computation error should have no bearing on whether or not the *Heck* bar applies. The sole question should be whether the action is challenging the legality of their confinement.

If Mr. Colvin had similar facts to Mr. Vernon where he had a valid judgment on his sentence which had thirty years of good-time credits and the prison officials were not applying it due to some administrative error, then Mr. Colvin's claim should not be barred by *Heck* simply because thirty years is a lot of time. Similarly if Mr. Hicks is claiming that he is already being held three months past his legal sentence, but his most recent judgment says that is not what his sentence is, Mr. Hicks's claims should not be given some sort of preference simply because he is arguing he is being over-detained and not that he will be over-detained. These threshold tests begin to set up an odd dynamic where *Heck* would bar the more lengthier claims of over-detention but not the shorter ones; despite the fact that the same legal principles apply in both cases. This goes against *Heck*, which asserts that the core issue is whether or not the claim would imply the validity of one's conviction or sentence. This question is not one that lends itself to a threshold or totality-of-circumstances type test.

Conclusion

The different circuit courts have analyzed the issue of whether the *Heck* bar should apply to over-detention cases in vastly different ways. Despite the current wide array of outcomes,

[230] *Hicks* at 532.

however, *Heck* should not bar any 'classic' over-detention cases. Furthermore, looking to see whether the plaintiff is embracing or challenging a relevant judgment on the matter could be a useful tool for analyzing when the *Heck* bar should apply. Finally, the 'threshold' mechanisms some of the courts seem to be developing to answer these questions seems ineffective and avoids the true inquiry being urged by *Heck.*

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Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
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Journal(s)	**Duke Journal of Comparative and International Law**
Moot Court Experience	**No**

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Prior Judicial Experience

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Hannah IsraelMarie
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June 26, 2023

The Hon. Jamar K. Walker
United States District Court for the Eastern District of Virginia
701 E Broad St, Richmond, VA 23219

Dear Judge Walker:

I am a rising third-year student at Duke Law, and I am writing to be considered for a clerkship in your chambers for the 2024–25 term. Clerking for you would be an incredible experience for multiple reasons. As a queer woman just starting her legal career, I would love to receive your mentorship as a strong federal judge. I would relish the opportunity to learn how the knowledge you gained throughout your diverse career has informed your judicial decision-making. Also, I am committed to a career in public interest law, and I noticed that you have spent many years in public service.

I was born and raised just outside of Philadelphia and pursued a bachelor's degree at Wheaton College, studying economics and mathematics. After college, I worked in fast-paced and demanding environments serving clients as a consultant at Slalom Consulting. In this position, I independently scaled a learning program for a global healthcare client during the COVID pandemic. The work involved managing stakeholder relationships, collaborating with a large team, developing personalized survey results for participants, and presenting resulting data to the clients. Through this experience, I learned to multitask and work quickly without compromising high-quality work product.

I have the skillset to support your chambers as a clerk. This upcoming fall, I will be externing for Judge Eagles on the United States District Court for the Middle District of North Carolina, which will prepare me for a post-graduation clerkship. In law school, I serve as the Editor in Chief of the Duke Journal of Comparative and International Law. I externed this spring with the National Immigrant Justice Center's federal litigation team, drafting a complaint to be filed in federal district court, legal memoranda, and more. I used my organizational skills as the Executive Director of the Duke Immigrant and Refugee Project, where I managed a team of eighteen other student leaders, placed one hundred students into pro bono projects, and led a spring break trip to the Stewart Detention Center.

I would be honored to contribute to your chambers. Attached are my resume, transcript, letters of recommendation, references, and writing sample. Thank you for considering my application.

Sincerely,

Hannah IsraelMarie

HANNAH ISRAELMARIE

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EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor and Certificate in Public Interest and Public Service Law, expected, May 2024
GPA: 3.67
Honors: Duke Journal of Comparative & International Law, *Editor in Chief*
Activities: Research Assistant for Professor Joseph Blocher & Professor Kate Evans, Duke Immigrant & Refugee Project, *Executive Director*, Guardian ad Litem Project, *Executive Director*, ACLU Duke Law Chapter, *Director of Operations*, Spring Break Pro Bono Trip 2023, *Student Leader*

Wheaton College, Wheaton, IL
Bachelor of Arts in Economics, Mathematics, *magna cum laude*, December 2018
GPA: 3.80
Study Abroad: Action, Authority, Ethics (AAE), Addis Ababa, Ethiopia, Spring 2016
Activities: Wheaton in Chicago: Urban Studies Program, Juvenile Justice Ministry, *Detainee Mentor*, International Justice Mission, *Event Coordinator*, Orientation Committee, *Student Leader*

EXPERIENCE

U.S. District Court Judge Catherine C. Eagles of the Middle District of North Carolina, Greensboro, NC
Judicial Extern, Expected, August 2023 – December 2023

National Immigration Project of the National Lawyers Guild (NIPNLG), Washington, DC (Remote)
Legal Intern, May 2023 – August 2023

National Immigrant Justice Center (NIJC), Chicago, IL (Remote)
Federal Litigation Extern, January 2023 – April 2023

- Conducted research and prepared legal memorandum analyzing potential causes of action against a county and private corporation, which operate an immigration detention center, for misappropriating federal funds.
- Drafted a complaint to be filed in the Northern District of Illinois regarding an outstanding FOIA request.

Duke Immigrant Rights Clinic, Durham, NC
Legal Intern, August 2022 – December 2022

- Collaborated with a local nonprofit to investigate local law enforcement and ICE collusion in pretextual stops and detentions of noncitizens; drafted Freedom of Information Act requests; drafted a memorandum on the North Carolina Public Records Act and potential barriers to receiving public documents.

Northwest Immigrant Rights Project (NWIRP), Wenatchee, WA (Remote)
Legal Intern, June 2022 – August 2022

- Managed a caseload of 15 clients throughout the summer, working on U visas, SIJS petitions, a VAWA self-petition, work authorization applications, criminal record requests, and drafting cover letters.
- Filed three I-589 asylum applications for clients from Ukraine, Malawi, and Nicaragua by completing intakes, gathering client information, developing each asylum claim, and submitting to USCIS.

Slalom Consulting, Chicago, IL
Consultant, August 2019 – August 2021

- Managed a leadership learning program for a global healthcare client; developed and scaled for over two hundred sales managers across Europe, Africa, and Asia.
- Created and facilitated an anti-racism workshop to help colleagues explore identity and privilege; nominated for prestigious "Merchant for Good" award for inclusive leadership and community service.

ADDITIONAL INFORMATION

Intermediate in Spanish. Enjoy playing piano, reading fiction, and running outside. Dog owner and at-home barista.

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Employment Discrimination	Jones, T.	3.8	3.00
Immigration Law & Policy	Evans, K.	3.9	3.00
Externship	Martinez, G.	*High Pass*	4.00
Independent Research Study	Abrams, K.	3.8	2.00
Spanish for Legal Studies	Kielmanovich, S.	*Credit only*	2.00

TOTAL CREDITS: 58.50
CUMULATIVE GPA: 3.674

Grading Policy

Duke Law School uses a slightly modified form of the traditional 4.0 grading scale. The modification permits faculty to recognize especially distinguished performance with grades above a 4.0, but no more than five percent (5%) of the grades in any class may be higher than a 4.0.

Prior to the 2022-23 academic year, Duke Law had an enforced maximum median grade as detailed below in all required doctrinal courses, first-year Legal Analysis, Research, and Writing (LARW) and in upper-level courses with more than ten (10) students. Required doctrinal courses are: Civil Procedure, Constitutional Law, Contracts, Criminal Law, Property, and Torts.

- In all required doctrinal courses, LARW, and upper-level courses with enrollments of fifty (50) or more students, the median grade was 3.3, with a mandatory distribution.
- In upper-level courses with enrollments of ten (10) to forty-nine (49) students, the maximum median grade was 3.5.
- There was no maximum median grade in upper-level courses with fewer than ten (10) students.
- A grade higher than 4.0 is comparable to an “A+” under letter grading systems. A grade of 1.5 or lower was failing.

Beginning in the 2022-23 academic year, Duke Law will have an enforced maximum median grade of 3.5 in all courses, both required and elective, regardless of enrollment. Grades in all first-year courses must follow a mandatory distribution. Similarly, for all upper-level courses in which at least 50 percent of the final grade is based on student performance on a uniform metric or series of metrics, grades must follow the mandatory distribution. A grade higher than 4.0 is comparable to an “A+” under letter grading systems. A grade of 2.0 or lower will be failing.

The Law School does not release class rank.

* For the Spring 2022 semester, the median grade was a 3.5 for upper-level courses with enrollments of 50 or more students, as well as for Property, Business Associations, International Law, and Administrative Law, elective courses in which first-year students were enrolled. These courses were also graded on a mandatory distribution.

Hannah IsraelMarie
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hannah.israelmarie@duke.edu

Writing Sample

I wrote this memorandum for my Legal Analysis, Research, and Writing course at Duke Law in the spring of 2022. We were assigned as counsel for either the Appellant or Appellee and were required to submit an Appellate Brief on behalf of our client. As an attorney for the Appellant, I sought a reversal of the district court's granted Motion to Dismiss in favor of the Appellee. The assignment included research on the Americans with Disabilities Act ("ADA") and addressed one key issue: whether Title III of the ADA should be interpreted to include internet websites. The assignment required a memorandum of 3500 words or less, including footnotes.

In order to submit a 10-page writing sample, I trimmed my original document. I removed the Cover Page, Table of Contents, Table of Authorities, Issues Presented, and Conclusion. I am happy to send the complete document upon request. Thank you in advance for your time and review of my writing sample.

STATEMENT OF FACTS

David Watt ("Mr. Watt") is a blind, disabled man who permanently lost all vision in a chemical accident at work in September 2018. R. at 2. Due to his resulting disability, Mr. Watt suffered from depression and post-traumatic stress disorder, and he struggled to leave his home. Id. He sought refuge on internet gaming websites and began using software to overcome his disability online. Id. Games Online, Inc. ("Games") is a Colorado company that owns and operates multiple gaming websites. R. at 1. Mr. Watt tried without success to use his software on Games's websites. R. at 2. He proceeded to contact a company representative, who stated that the websites were encoded in a way that is not compatible with software for the disabled. R. at 3. Mr. Watt asked the CEO if the websites could be made more accessible by adjusting the encoding technology, but the CEO said Games would not accommodate Mr. Watt. Id.

In October 2021, Mr. Watt sued Games in the United States District Court for the District of Colorado, R. at 1, for discriminating against Mr. Watt by denying him access to a public accommodation under Title III of the ADA, R. at 4. Protected under the ADA, Mr. Watt's disability qualifies him as a person with disability. R. at 1. In his complaint, Mr. Watt asserted that Games's websites are a "public accommodation" under the definitions provided in 42 U.S.C. § 12181(7)(C), (I), & (L). R. at 3. Subsequently, Games filed a Motion to Dismiss pursuant to Rule 12(b)(6) for failure to state a claim and asserted that its gaming websites are not "public accommodations" under Title III. R. at 5. The district court granted Games's Motion to Dismiss. R. at 11. In response, Mr. Watt appealed to the United States Court of Appeals for the Tenth Circuit. R. at 12.

ARGUMENT

Justice for the disabled means justice for all. Both the plain meaning of "place of public accommodation" as well as the statute's overarching purpose to combat disability discrimination illustrate that internet websites fall under the language of the ADA. Thus, the district court erred in granting Games's Motion to Dismiss, and this Court should reverse and remand.

A court should deny a Rule 12(b)(6) motion to dismiss when the complaint states "a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) dismissal is not appropriate when the complaint contains sufficient factual matter to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A complaint meets this plausibility standard, which requires more than sheer possibility, when a court reasonably can infer that the defendant is indeed liable. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A court reviews a Rule 12(b)(6) dismissal de novo and must construe all well-pleaded allegations favorably to the plaintiff. Nat'l Res. Def. Council v. McCarthy, 993 F.3d 1243, 1250 (10th Cir. 2021).

Responding to pervasive oppression against the disabled, Congress passed the ADA in 1990. PGA Tour v. Martin, 532 U.S. 661, 674 (2001). The ADA forbids discrimination against the disabled in major spheres of public life, including employment, public services, and public accommodations. Id. at 675; see generally Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213. Title III states that individuals shall not be "discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." § 12182(a).

Currently, a circuit split exists regarding whether the term "place of public accommodation" encompasses websites. The right-minded Circuits, the First and Seventh,

correctly conclude that websites are places of public accommodation. Carparts Distrib. Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, 37 F.3d 12, 19 (1st Cir. 1994); Morgan v. Joint Admin. Bd., 268 F.3d 456, 459 (7th Cir. 2001). Erroneously on the other side, the Third and Sixth Circuits hold that website are not places of public accommodation. Ford v. Schering-Plough Corp., 145 F.3d 601, 612 (3d Cir. 1988); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1014 (6th Cir. 1997) (en banc). A middle-ground approach adopted by the Second, Ninth, and Eleventh Circuits, called the "nexus test," requires an established connection between a website and a brick-and-mortar institution. Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33 (2d Cir. 1999); Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir. 2019); Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1285 (11th Cir. 2002).[1] For the Tenth Circuit, this is a question of first impression.

Here, this Court should hold that Games's gaming website is a place of public accommodation under Title III. First, the plain meaning of the statutory language includes application to the provision of services through intangible mediums like the Internet. Second, the overarching legislative purpose behind the ADA, including an intention for liberal construction, crystalizes that Title III applies to websites. For these reasons, this Court should hold that internet websites are places of public accommodation and reverse and remand the district court.

I. TITLE III OF THE ADA SHOULD BE INTERPRETED TO ENCOMPASS WEBSITES BASED ON THE PLAIN MEANING OF THE STATUTORY LANGUAGE WHEN A BLIND, DISABLED MAN HAS BEEN DENIED FULL AND EQUAL ENJOYMENT OF A GAMING WEBSITE.

[1] Every website does exist in a particular geographical location, contrary to the Eleventh Circuit noting that southwest.com was deemed not a place of public accommodation since it did not exist in any specific geographical location in a prior lower court decision. Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1328 (11th Cir. 2004). Internet websites exist on servers, which "are located all over the world; some are even located on remote islands." Amanda Bailey & Domenic Paolini, Using the Internet in Discovery and Investigation, in Massachusetts Discovery Practice § 7.1 (Thomas Wintner ed., 2021).

The plain meaning of Title III includes websites as places of public accommodation. Numerous textual arguments compel this interpretation, including the dictionary definition of the term "place," the prepositional selection of "of" rather than "at" or "in," the use of the word "services," and the "other place of" terminology in the statutory definitions. Therefore, this Court should hold that the ordinary meaning of the statute encompasses websites, and the district court should be reversed.

Statutory interpretation starts with the words of the statute. Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1231 (10th Cir. 2016). Although "place of public accommodation" is used throughout Title III, the word "place" is not defined. Courts often construe the word in accordance with its "ordinary or natural meaning." F.D.I.C. v. Meyer, 510 U.S. 471, 477 (1994). When determining ordinary meaning, courts may look to a dictionary definition. See, e.g., id. (defining the term "cognizable" according to Black's Law Dictionary). In 1989, "place" was defined as "a particular part of space, of defined or undefined extent, but of definite situation." Place, Oxford English Dictionary 937 (2d ed. 1989). Rather than confinement to a physical location, this definition suggests a broader meaning consistent with the notion that "place" of public accommodation includes websites.

The preposition used in the statute also suggests no limitation to physical spaces. The language of the statute applies to discrimination in offering goods and services "of" a place of public accommodation rather than limiting to those provided "at" or "in" a place of public accommodation. Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 201 (D. Mass. 2012). This distinction illustrates that discrimination does not need occur onsite to violate the plain text, and Title III is not limited to the provision of goods and services provided "in" physical structures but also covers other mediums, such as phone calls and the Internet. See

Rendon, 294 F.3d at 1283–84 (stating that the plain statutory language reveals that discrimination under Title III covers both tangible, physical barriers and intangible barriers).

The broad meaning of the text is also evident through the word "services." Section 12182(a) states that individuals shall not be discriminated against in the full and equal enjoyment of "services" of any "place of public accommodation." § 12182(a). Restricting the ADA to services provided within physical premises contradicts the plain language of the statute, and resultingly, many businesses that provide services outside of office premises, such as plumbers or moving companies, would be exempt from following the ADA. Nat'l Ass'n, 869 F. Supp. 2d at 201. Courts should give effect to every word of a statute, avoiding any construction which implies that the legislature was ignorant of the meaning of the language it chose. Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 21 (2006). The word "services" was purposefully included in the text and implies a liberal interpretation of the statutory language to include intangible mediums such as the Internet.

Further, the relevant definitions provided in the text of the ADA are subsections (C), (I), and (L), which include the following language: "other place of exhibition or entertainment," § 12181(7)(C), "other place of recreation," § 12181(7)(I), and "other place of exercise or recreation," § 12181(7)(L). This "other place of" language acts as a broad catch-all and does not explicitly limit the definition to the enumerated terms, causing the list to function more as illustrative rather than exhaustive.[2] Within another subsection of the definitions, subsection (F),

[2] The ADA's statutory language is clear, which removes the need to consider canons of construction like noscitur a sociis and ejusdem generis. Levorsen v. Octapharma Plasma, Inc., 828 F.3d at 1232. But see Ford, 145 F.3d at 614 (stating that noscitur a sociis compels an interpretation referencing the accompanying words of the statute); Parker, 121 F.3d at 1014 (holding that noscitur a sociis should be used to avoid permitting unintended breadth). Additionally, a contrary canon advises against reading words into a statute that do not appear in

the court in Carparts noted that the private entities listed such as "travel services" (citing § 12181(7)(F)), typically do not require people to physically enter a building but rather involve correspondence outside of physical offices. 37 F.3d at 19. It is illogical that disabled people who enter an office are protected and yet those who might purchase the same services electronically are not. Id.

Although Congress delegated authority to the Attorney General to enact regulations to carry out the ADA's broad mandate, § 12186(b), deference is not owed when the regulations go beyond the meaning of the statute. MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994). If any deference is awarded, it is owed only if the intent of Congress is unclear, and the administrative interpretation is both reasonable, Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 508 (1992), and uniform, United States v. Missouri Pac. R.R., 278 U.S. 269, 280 (1929). The ordinary meaning and congressional intent surrounding the ADA is clear, and thus there is no need to consider the regulations. Recalling that Congress defined only "public accommodation" in § 12181(7), the regulations seek to additionally define both "place of public accommodation" and "facility," unnecessarily narrowing the scope of the statute and what Congress intended. 28 C.F.R § 36.104 (2022). Further, the Department put forth recent pronouncements that are diametrically opposed to its regulations, making its interpretations unreasonable and changeable. In 1999, the Department submitted an amicus brief articulating that an internet company was a place of public accommodation. Brief for the United States as Amicus Curiae Supporting Appellant at 5, Hooks v. OKBridge, Inc., No. 99-50891, 2000 WL 1272847 (2000). The Department also stated that its regulations should be construed to keep up

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the text itself, which can lead to a confusing, unnecessary battle of the canons. Levorsen, 828 F.3d at 1232–33. Thus, the plain, liberal meaning of the text should hold.

with changing technologies. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43463 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36). Additionally, in 2010, the Department proposed and withdrew a new rule excluding the need for a physical location altogether. Id. at 43460. These recent pronouncements accurately interpret the ADA by aligning with the text's plain meaning and should be adopted by this Court.

Here, Mr. Watt has a valid claim as Games's websites are places of public accommodation. Mr. Watt asserted that the websites are a public accommodation under the definitions provided in subsections (C), (I) & (L) of the statute. R. at 3. The broad "other place of" terminology utilized in these selected definitions along with other statutory plain language compel the interpretation that Games's gaming websites qualify under Title III. Therefore, this Court should hold that Mr. Watt's Compliant does state a plausible claim and reverse the district court.

II. TITLE III OF THE ADA SHOULD BE INTERPRETED TO INCLUDE WEBSITES BASED ON THE UNDERLYING LEGISLATIVE INTENT WHEN A BLIND, DISABLED MAN HAS BEEN DENIED FULL AND EQUAL ENJOYMENT OF A GAMING WEBSITE.

Reading "place of public accommodation" to encompass websites is consistent with the overarching legislative purpose for the ADA. The broad intent behind the statute is supported by the enacted findings and purposes, prior congressional statements, a previous bill version, the request for liberal construction surrounding the "other place of" terminology, and the corresponding evolution of the statute and technology. Thus, aligned with congressional intent, this Court should hold that Title III applies to websites.

Central to statutory interpretation by the courts is the clear, expressed intent of Congress. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Sometimes,

Congress offers an explicit window into its rationale through enacted findings and purposes, and courts turn to these as explanations of Congress's expectations for the legislation. See, e.g., Holder v. Humanitarian L. Project, 561 U.S. 1, 29 (2010) (reviewing enacted findings to decide whether certain types of assistance to terrorist organizations was prohibited). The enacted findings of the ADA emphasize a wide-reaching equality for the disabled. See § 12101(a)(2) (stating that Congress hoped to combat pervasive, societal discrimination and segregation against individuals with disabilities); see also § 12101(a)(7) (listing reasons why the ADA was passed, including to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for disabled individuals). Also, the enacted purposes state that the ADA sought to combat discrimination by providing "a clear and comprehensive national mandate" as well as consistent, enforceable standards. §§ 12101(b)(1), (2).

When looking beyond the statute itself, courts use traditional interpretation tools such as analysis of legislative history and statements of Congress members during its consideration. United States v. Great Ry. Co., 287 U.S. 144, 154–55 (1932). The ADA's history illustrates a broad approach to combatting disability discrimination, seeking to "bring individuals with disabilities into the economic and social mainstream of American life." H.R. Rep. No. 101-485, pt. 2, at 99 (1990). The ADA was formulated in response to a pervasive history of oppression, including external and unnecessary barriers that function as the largest obstacles for the disabled and sideline them to the margins of life. Americans with Disabilities Act of 1988: Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Comm. on Lab. and Hum. Res. U.S. S. and the Subcomm. on the Select Educ. of the Comm. on Educ. and Lab. H.R., 100th Cong. 3 (1988) (statement of Sen. Lowell Weicker Jr., S. Comm. on the Handicapped). To accomplish the desired, broad construction, the previous version of the bill when first introduced to the

Senate defined "public accommodation" as an establishment that is "used by the general public as customers, clients, or visitors" and "whose operations affect commerce" and then separately included a list of examples. S. 933, 101st Cong. § 401 (1989). Contrastingly, the example list now serves as the current definition itself, narrowing down the instances where the ADA might apply. See generally § 12181(7). The previous version of the bill illustrates that websites would have fallen under the original, broad definition of public accommodation, and this more closely aligns with Congress's intent.

In addition, a remedial statute, like the ADA, is to be liberally construed to effectuate its purpose and remedy the defects in the law that Congress had in mind when creating the statute. United States v. Zazove, 334 U.S. 602, 610 (1948). Specifically, Congress acknowledged that the "other place of" terminology within the twelve categories of the current definition should be construed broadly, consistent with Congress's intent for disabled people to have access equal with the able-bodied. H.R. Rep. No. 101-485, pt. 2, at 100; see also PGA Tour, 532 U.S. at 676–77 (stating that courts must construe definitions liberally to afford equal access to disabled individuals). A person must prove that the entity falls within the category generally, but not that the entity is similar to the specific examples listed since the examples were not meant to limit the catch-all categories. H.R. Rep. No. 101-485, pt. 3, at 54 (1990); see also Levorsen, 828 F.3d at 1233 (holding that an entity does not need to be "similar" to listed examples to fall under § 12181(7)(F)). Also, "lack of physical access to facilities" is only one of the multiple major areas of discrimination addressed. H.R. Rep. No. 101-485, pt. 2, at 35.

Further, although the statute was enacted without widespread use of the Internet in mind, Congress intended for the ADA to be adaptable and "keep pace with the rapidly changing technology of the times." Id. at 108. Since 1990, internet usage has drastically increased and is

used for a multitude of social and economic purposes. Congress was unable to consider Title III applying to websites since it was before the Internet's drastic rise, but this does not mean that websites are necessarily excluded. See, e.g., Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 211 (1998) (finding that while Congress originally did not expressly anticipate applying the ADA to state prisoners, the ADA now applies to prisons). Recently, the COVID pandemic has furthered Internet reliance in unparalleled ways for a multitude of essential activities, including e-learning, working, ordering takeout, scheduling COVID tests, and more. Randy Pavlicko, The Future of the Americans with Disabilities Act: Website Accessibility Litigation After COVID-19, 69 Clev. State L. Rev. 953, 954 (2021). Online actions remain inaccessible for people with disabilities until the ADA is interpreted to encompass websites and fully protect the disabled.[3]

Here, aligned with congressional intent, Mr. Watt has a valid claim against Games since its websites are places of public accommodation. Mr. Watt is completely blind, R. at 1, and his disability qualifies him to seek protection under the ADA, Id. Mr. Watt turned to online gaming during the COVID pandemic to help overcome his depression and isolation that came along with his disability. R. at 2. Congress intended for Mr. Watt to access this therapeutic refuge of the Internet in the same way as the able-bodied and to participate in the mainstream of life today. Thus, this Court should hold that websites are places of public accommodation within the meaning of the statute and reverse the district court.

[3] Congressional inaction is not persuasive since it can suggest multiple inferences, including that the existing text already incorporates the debated change. United States v. Craft, 535 U.S. 274, 287 (2002). While it may be contended that Congress has not acted within the past 30 years to explicitly include the Internet within the ADA, in the wake of such inaction, the court is not relieved of its duty to interpret the ADA by its plain text and the legislature's intent.

Applicant Details

First Name	**Emma**
Middle Initial	**L.**
Last Name	**Janson**
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Contact Phone Number	**3102510508**

Applicant Education

BA/BS From	**University of Washington**
Date of BA/BS	**June 2020**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Federal Circuit Bar Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Van Vleck Constitutional Law Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Emma L. Janson

2020 F St NW #627 · Washington, D.C. 20006 · (310) 251-0508 · emma.janson@law.gwu.edu

June 12, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a law student at The George Washington University Law School and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024 term. I am enclosing a resume, law transcript, and writing sample. Also enclosed are letters of recommendation from David W. Kesselman and Professors Emily Hammond and Roger Trangsrud. Thank you for your consideration.

Respectfully,

Emma Janson

Emma L. Janson

Emma L. Janson

2020 F St NW #627 · Washington, D.C. 20006 · (310) 251-0508 · emma.janson@law.gwu.edu

EDUCATION

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL Washington, D.C.
Transfer Student, J.D. Expected May 2024
GPA: 3.716; George Washington Scholar (top 1% to 15% of class, as of Spring 2023)
Activities: Senior Articles Editor, *Federal Circuit Bar Journal* Vol. 33; Member, GW Law Moot Court Board; Problem Author, Van Vleck Constitutional Law Moot Court Competition (Fall 2023)
Honors: Best Brief Writer—First Place, Van Vleck Constitutional Law Moot Court Competition (Fall 2022); George Washington University Law School Public Interest Scholarship Grant (Summer 2023)

UNIVERSITY OF WASHINGTON Seattle, WA
B.A. in Political Science, June 2020
Activities: Delta Zeta Sorority (Kappa Chapter)

EXPERIENCE

DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGES Washington, DC
Intern May-August 2023

- Work with one intern and several clerks and staff attorneys to support seven Administrative Law Judges.
- Conduct extensive research in various labor and employment law fields, including black lung benefits, longshore and harbor workers' compensation, whistleblower protections, and immigration issues and prepare memoranda for Administrative Law Judges.
- Review and edit Administrative Law Judges' decisions and orders.
- Observe onsite, virtual, and telephonic hearings and settlement conferences.

KESSELMAN BRANTLY STOCKINGER LLP Manhattan Beach, CA
Law Student Extern/Legal Assistant December 2020-May 2023

- Worked with three paralegals to support thirteen attorneys, as well as outside counsel, in complex business litigation including antitrust actions and contract disputes.
- Assisted attorneys during proceedings by creating presentations to accompany oral arguments, displaying exhibits during witness examination, and taking extensive notes.
- Conducted legal research and consolidated into concise reports for attorneys.
- Carried out thorough citation checks and proofread attorneys' work product for grammar and structure.
- Interfaced with clients and outside sources to collect data and calculate potential recovery in class actions and communicated with claims administrators to submit recovery claims in class settlements.

PODY & MCDONALD, PLLC Seattle, WA
File Clerk March 2017-October 2019

- Worked with four file clerks to support three attorneys representing condominium owners' associations.
- Drafted legal documents such as liens, lis pendens, and wage garnishments.
- Worked with county offices to gather client files for cases and carried out research and new client intake.

SKILLS, COMMUNITY SERVICE, & OTHER INTERESTS

- Skills: Intermediate-level Spanish; proficiency in Microsoft Office Suite and Adobe programs.
- Community service: Ride to Fly (Community Volunteer, Spring/Summer 2020), a nonprofit program providing equine occupational therapy for children and adults with disabilities.
- Other interests: Hiking, yoga, live music events, trivia competitions.

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G25187658
Date of Birth: 19-OCT

Date Issued: 05-JUN-2023

Record of: Emma L Janson

Page: 1

Student Level: Law
Admit Term: Fall 2022

Issued To: EMMA JANSON
EMMA.JANSON@GWU.EDU

REFNUM:5599962

Current College(s):Law School
Current Major(s): Law

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
NON-GW HISTORY:			
2021-2022	Chapman University		
LAW 6202	Contracts	3.00	TR
LAW 6206	Torts	5.00	TR
LAW 6208	Property	4.00	TR
LAW 6210	Criminal Law	3.00	TR
LAW 6212	Civil Procedure	3.00	TR
LAW 6216	Fundamentals Of Lawyering I	3.00	TR
LAW 6217	Fundamentals Of Lawyering II	3.00	TR
LAW 6700	Contracts II	3.00	TR
LAW 6700	Civ Pro II	2.00	TR
Transfer Hrs: 29.00			
Total Transfer Hrs: 29.00			
GEORGE WASHINGTON UNIVERSITY CREDIT:			
Fall 2022			
Law School			
Law			
LAW 6209	Legislation And Regulation Dooling	3.00	A+
LAW 6214	Constitutional Law I Maggs	3.00	B+
LAW 6397	Federal Indian Law Alexander	2.00	B+
LAW 6400	Administrative Law Hammond	3.00	A
LAW 6402	Antitrust Law Kovacic	3.00	A-
LAW 6644	Moot Court - Van Vleck	1.00	CR
Ehrs 15.00 GPA-Hrs 14.00 GPA 3.762			
CUM 15.00 GPA-Hrs 14.00 GPA 3.762			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Spring 2023			
Law School			
Law			
LAW 6218	Professional Responslbty/Ethic	2.00	A
LAW 6238	Remedies	3.00	A-
LAW 6266	Labor Law	2.00	A-
LAW 6268	Employment Law	2.00	A
LAW 6380	Constitutional Law II	4.00	B+
Ehrs 13.00 GPA-Hrs 13.00 GPA 3.667			
CUM 28.00 GPA-Hrs 27.00 GPA 3.716			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
Law School			
Law			
LAW 6657	Fed Circuit Bar Jrnl Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2023			
Law School			
Law			
LAW 6657	Fed Circuit Bar Jrnl Note	1.00	----------
	Credits In Progress:	1.00	
Fall 2023			
LAW 6230	Evidence	3.00	----------
LAW 6236	Complex Litigation	3.00	----------
LAW 6240	Litigation W/ Fed Govt.	2.00	----------
LAW 6360	Criminal Procedure	3.00	----------
LAW 6640	Trial Advocacy	3.00	----------
LAW 6660	Federal Circuit Bar Journal	1.00	----------
	Credits In Progress:	15.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	28.00	27.00	100.33	3.716
TOTAL NON-GW HOURS	29.00	0.00	0.00	0.00
OVERALL	57.00	27.00	100.33	3.716

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Emma Janson as an outstanding candidate for a clerkship with your Honor.

I know Emma well. She was my student last spring in my Remedies course. This is a small class [about 30 students] which attracts some of the brightest students at the law school who have an interest in civil litigation and clerking. The class focuses on injunctions, damages, restitution, and contempt issues. She earned one of the highest grades I gave in the class. This was no surprise because she has received outstanding grades in almost all her classes on her way to becoming a George Washington Scholar.

Whenever I called on Emma in class she always gave sophisticated and thoughtful answers. She is an unusually hard working and gifted student. Her writing and research skills earned her a position on our reknowned Federal Circuit Journal as Senior Articles Editor. Most significantly, however, she demonstrated her exceptional research and writing skills by winning the title of best brief writer in our most prestigious moot court competition – the Van Vleck competition.
If Emma joins your chambers, she will be one of the most well-prepared clerks you have ever hired. You can be sure she will hit the ground running on the first day of her clerkship.

If you have any questions for me about Emma, please call me [202-994-6182] or send an email [rtrang@law.gwu.edu]. Best regards.

Very truly yours,

Roger H. Trangsrud
James F. Humphreys Professor of Civil Procedure and Complex Litigation

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to express my strongest support of Emma Janson's application for a clerkship.

Emma arrived at GW as a transfer student in the Fall of 2022; I highlight this point because she transferred to a much larger, more rigorous law school and promptly demonstrated that she has what it takes to shine anywhere. As a student in my Administrative Law course that fall, Emma stood out for her scholarly acuity and sincere engagement with the material. Her A in the course speaks for itself—as does her remarkable overall record this past year, which includes Best Brief in the school's premier constitutional law moot court competition.

Indeed, Emma's writing and research capabilities are among the strongest of her class. I had the pleasure of meeting with her several times as she worked on her journal note, and I remain incredibly impressed with her oral legal communication skills (she was able to quickly bring me up to speed in her work), her discernment of implications beyond her immediate topic, and her sophisticated ability to draw analogies and distinctions associated with other related areas of law. From Emma, you can expect a clerk who can talk through a matter with you (she will come thoroughly prepared), research with aptitude and thoughtfulness, and write cogently and with conviction. Along the way, I predict that you would enjoy every moment of working with her, as she delights in the law even while looking for ways it could be more just.

From this letter, I hope you can see that I hold Emma in my highest regard. I would be delighted to answer any questions you might have.

Sincerely yours,

Emily Hammond
Vice Provost for Faculty Affairs
Professor of Law
202-994-6024
emilyhammond@law.gwu.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to enthusiastically and without reservation recommend Emma Janson for a law clerk position in your chambers. I am pleased to give Emma my absolute highest recommendation. As an experienced attorney, I have rarely seen someone with Emma's remarkable skills and talents. I am confident that she will be a true asset to your chambers.

Emma has worked at our law firm for approximately two years. Emma started as a legal assistant and, after she started law school, transitioned to become an outstanding law student extern. Our firm specializes in antitrust and complex business litigation, and we routinely litigate in federal district and appellate courts. My colleagues and I have "big firm" experience and we have worked with many legal professionals over the years. I can state unequivocally that, even before starting law school, Emma demonstrated more talent than any legal assistant I ever had the pleasure of working with. I have never worked with someone with her innate ability to review complex antitrust case dockets, quickly locate and synthesize the key filings and rulings, and provide succinct and accurate summaries.

As a law student extern, Emma continued to excel at our firm due to her tremendous facility for research and analysis. Emma has consistently demonstrated a deep understanding of the key issues in cases and time and again has proved invaluable as a member of our team. Part of what sets Emma apart is her tremendous initiative. Whenever she has been asked to work on a project, she always goes above and beyond and makes certain that all aspects of the project are fulfilled – often without an attorney specifically asking her to do it. I make these observations about Emma not only as a practitioner but also as an experienced adjunct professor of antitrust law at Loyola Law School in Los Angeles, where I have had the benefit of evaluating law students over many years.

In addition to her legal talents, Emma is an absolute pleasure to work with. She is the consummate team player and has demonstrated a collegiality that has made her an integral part of our firm in a very short period of time. While she is currently spending this summer working for administrative law judges within the U.S. Department of Labor, we are all looking forward to Emma coming back to extern for our firm again in the Fall. Because of Emma's exceptional talents, I can say without hesitation that I would hire her as a full-time attorney once she completes her law school studies.

Again, I give Emma my highest recommendation. I truly believe that she will be an asset to your chambers. I would be very pleased to discuss her application at any time.

Respectfully,

David W. Kesselman

David Kesselman - dkesselman@kbslaw.com - (310) 307-4555

"Don't put your head up, because it will get blown off"[1]: Federal Whistleblowers Face Continued Antipathy Under the All Circuit Review Act

Emma L. Janson
Federal Circuit Bar Journal

[1] Lilyanne Ohanesian, *Protecting Uncle Sam's Whistleblowers: All-Circuit Review of WPA Appeals*, 22 FED. CIR. B. J. 615, 618-19 (2012-13).

Table of Contents

I. Introduction

Whistleblower protections for federal government employees were first codified in the Civil Service Reform Act of 1978 ("CSRA").[2] It soon became apparent that the CSRA's protections had not materially improved outcomes for whistleblowers, largely due to excessively narrow interpretation by the United States Court of Appeals for the Federal Circuit, which had exclusive jurisdiction over whistleblower reprisal claims.[3] In response, Congress enacted the Whistleblower Protection Act of 1989 ("WPA"),[4] but the Federal Circuit continued its "steady attack"[5] on whistleblower protections,[6] prompting several rounds of further statutory amendments.[7]

Vocal factions in Congress have consistently advocated for ending the Federal Circuit's exclusive jurisdiction over whistleblower reprisal claims and permitting judicial review by all of the federal circuit courts.[8] In 2012, Congress created a two-year pilot program during which all of the circuit courts had jurisdiction over whistleblower appeals;[9] the program's duration was later extended to five years,[10] then ultimately made permanent by the All Circuit Review Act

[2] *See* Civil Service Reform Act of 1978, Pub. L. 95-454, § 101, 92 Stat. 1111, 1114-17.

[3] *See generally* Ohanesian, *supra* note 1, at 617-19; Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 532-34 (1999).

[4] *See* Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16.

[5] H.R. REP. NO. 103-769 (1994).

[6] *See generally* Gil Landau, *Is It Safe to Speak Up Now? Evaluating the Expansion of Whistleblower Protection Act Jurisdiction*, 36 J. NAT'L ASS'N L. JUD. 469, 475-79 (2016).

[7] *See id.* at 475-76, 479-80.

[8] *See* Landau, *supra* note 6, at 476.

[9] *See* Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199, § 108, 126 Stat. 1465, 1469.

[10] *See* All Circuit Review Extension Act, Pub. L. 113-170, § 2, 128 Stat. 1894, 1894 (2014).

("ACRA").[11] Although all-circuit review has finally been implemented,[12] the circuit courts have generally been hesitant to disrupt decades of Federal Circuit jurisprudence by adopting more whistleblower-friendly doctrines.[13]

Part II of this Note traces the history of federal employee whistleblower protections, culminating in the enactment of the ACRA. Part III surveys the whistleblower reprisal cases taken up by the regional circuit courts following the enactment of the ACRA, noting that they have largely refused to depart from longstanding Federal Circuit precedents. Part IV analyzes the whistleblower reprisal cases taken up by the Federal Circuit itself following the enactment of the ACRA.

II. History of the All Circuit Review Act

A. Civil Service Reform Act of 1978

The CSRA was a sweeping effort to "provide the people of the United States with a competent, honest, and productive [f]ederal work force…and to improve the quality of public service" by revamping the rules governing federal personnel practices.[14] It defined eleven categories of "prohibited personnel practices" in federal agencies,[15] empowering the Office of Special Counsel ("OSC") to investigate prohibited practices and the Merit Systems Protection Board ("MSPB") to adjudicate personnel disputes.[16]

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[11] *See* All Circuit Review Act, Pub. L. 115-195, § 2, 132 Stat. 1510, 1510 (2018).

[12] *See id.*

[13] *See infra* parts III.B.-III.I.

[14] Civil Service Reform Act of 1978, Pub. L. 95-454, § 3, 92 Stat. at 1112.

[15] *See* Pub. L. 95-454, § 101, 92 Stat. at 1114-17.

[16] *See* Pub. L. 95-454, § 202, 92 Stat. at 1122-30. Judicial review of MSPB decisions was originally to be sought in the Court of Claims. *See id.* at 1143. The Court of Claims was eventually subsumed by the newly created Federal Circuit. *See generally* Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1459-60 (2012).

Congress recognized the crucial function of whistleblowers, noting that "[p]rotecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service…it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth."[17] The CSRA's whistleblower provisions provided that "[e]mployees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences – (A) a violation of any law, rule, or regulation, or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,"[18] making it a prohibited practice to "take or fail to take" any personnel action as reprisal for such a disclosure.[19]

The insufficiency of the CSRA's whistleblower protections soon became apparent, primarily because of Congress's failure to create a widely available independent right of action.[20] Whistleblowers could only pursue their own claims before MSPB if they had suffered demotion or disciplinary action greater than a two-week suspension, while those subject to reprisal in the form of reassignment, reprimand, or other less severe discipline had to wait for OSC to initiate proceedings on their behalf.[21] If OSC declined to take action, the latter group was left without a remedy.[22]

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[17] S. REP. NO. 95-969, at 8 (1978).

[18] Such disclosures are called "protected disclosures." Pub. L. 95-454, § 101, 92 Stat. at 1114.

[19] *Id.* at 1116.

[20] *See* Devine, *supra* note 3, at 534.

[21] *See id.* at 534, 540.

[22] *See id.*

This insufficiency was exacerbated by OSC's and MSPB's perceived hostility to whistleblowers.[23] OSC did not initiate a single whistleblower reprisal proceeding after 1979,[24] and MSPB ruled in whistleblowers' favor on the merits in only four out of more than two thousand decisions between 1979 and 1989.[25] During that ten-year period, whistleblowers' fear of reprisal nearly doubled, and employees who declined to speak out about misconduct cited fear of reprisal as the greatest impediment to whistleblowing.[26] MSPB made clear that its primary goal was to prevent federal employees' use of whistleblower protections as a weapon against legitimate personnel actions, declaring that the CSRA "should not be construed as protecting an employee who is otherwise engaged in misconduct, or who is incompetent, from appropriate disciplinary action."[27] Therefore, MSPB would only find in a whistleblower's favor where it found that reprisal was the "motivating factor" or "real reason" for the personnel action at issue.[28]

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[23] *See id.* at 534; Ohanesian, *supra* note 1, at 618.

[24] *See* Ohanesian, *supra* note 1, at 618. Rather than investigate and prosecute reprisal claims, OSC instructed agency management in how to terminate whistleblowers without incurring liability, often putting whistleblowers at risk by disclosing the contents of their allegations to their employers. *See id.* at 618-19; Devine, *supra* note 3, at 534.

[25] *See* Devine, *supra* note 3, at 534. All four of the cases were decided on the basis that the employers had failed to establish that they would have taken the same adverse action absent the claimants' whistleblowing conduct. *See* Anderson v. Dep't of Agric., 9 M.S.P.R. 536, 538-39 (1982); Plaskett v. Dep't of Health & Hum. Servs., 10 M.S.P.R. 289, 291-92 (1982); Spadaro v. Dep't of Interior, 18 M.S.P.R. 462, 463-67 (1983); Sowers v. Dep't of Agric., 24 M.S.P.R. 492, 493-96 (1984).

[26] *See* Devine, *supra* note 3, at 533 (citing MSPB: Office of Merit Systems Review and Studies, *Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings*, 31, 34 (1984)).

[27] Gerlach v. Fed. Trade Comm'n, 9 M.S.P.R. 268, 274 (1981). MSPB further explained that if an employee "has had several years of inadequate performance…[or] has engaged in action which would constitute dismissal for cause, the fact that the employee 'blows the whistle' on his agency after the agency has begun to initiate disciplinary action…will not protect the employee against such disciplinary action." *Id.* MSPB did not cite any examples of federal employees engaging in the described behavior. *See id.*

[28] *Id.*

B. Whistleblower Protection Act of 1989

The failures of the CSRA, compounded by several Federal Circuit decisions narrowing its scope,[29] motivated Congress to take a more expansive approach via the 1989 enactment of the Whistleblower Protection Act.[30] Recognizing that its "well-intentioned efforts to protect whistleblowers [had] thus far had little effect,"[31] Congress sought to "strengthen and improve protection for the rights of [f]ederal employees, to prevent reprisals, and to help eliminate wrongdoing within the [g]overnment."[32] The WPA contained several procedural and substantive improvements on the CSRA to address the various grievances that had arisen in its enforcement.[33]

Congress first admonished OSC that its primary role was "to protect employees, especially whistleblowers, from prohibited personnel practices" because employee protection "remain[ed] the paramount consideration."[34] The WPA reduced OSC's power over whistleblowers' claims by expanding the availability of an independent cause of action; any whistleblower who alleged reprisal was given the right to file a claim with MSPB rather than waiting for OSC to take up their case.[35]

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[29] *See* H.R. REP. NO. 100-274 (1987); S. REP. NO. 100-413 (1988).

[30] Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16.

[31] S. REP. NO. 100-413 (1988).

[32] Pub. L. 101-12, § 2, 103 Stat. at 16.

[33] *See id.*

[34] *Id.*

[35] *See* Pub. L. 101-12, § 3, 103 Stat. at 29-30. "Under current law, there are a number of situations for which an alleged whistleblower's only route of appeal is the OSC; this provision is intended to allow whistleblowers who suffer reprisal the further right of appeal to the MSPB." S. REP. NO. 100-413 (1988). However, OSC still served an important gatekeeping function: Whistleblowers had to initially file their complaints with OSC and could only seek MSPB review if OSC issued adverse decisions or failed to act within 120 days. *See* Pub. L. 101-12, § 3, 103 Stat. at 29.

The WPA also expanded the definition of prohibited personnel practices and clarified the scope of protected disclosures. The CSRA only prohibited reprisal in the form of formal personnel actions; the WPA expanded this prohibition to include threats of adverse action,[36] as Congress recognized that harassment and threats also tended to severely chill whistleblowing conduct.[37] While the CSRA had protected the making of "*a* disclosure" of government wrongdoing or mismanagement,[38] the WPA extended the same protection to "*any* disclosure" of the same.[39] This small but significant change was intended to overturn two Federal Circuit decisions[40]: *Fiorillo v. Department of Justice*[41] and *Stanek v. Department of Transportation*.[42]

In *Fiorillo*, the Federal Circuit had imposed new burdensome and multi-layered tests for assessing whether a whistleblower had made a protected disclosure.[43] One of these was a First Amendment balancing test,[44] because the court reasoned that disclosures could only receive CSRA protection if they also merited free speech protection.[45] The prescribed test weighed the

[36] *Compare* Civil Service Reform Act of 1978, Pub. L. 95-454, § 101, 92 Stat. 1111, 1114-15, *with* Pub. L. 101-12, § 4, 103 Stat. at 32.

[37] *See* 135 CONG. REC. 5035 (1989) (Joint Explanatory Statement, S. 2784).

[38] Pub. L. 95-454, § 101, 92 Stat. at 1116 (emphasis added).

[39] Pub. L. 101-12, § 4, 103 Stat. at 32 (emphasis added).

[40] *See* S. REP. NO. 100-413 (1988).

[41] 795 F.2d 1544 (Fed. Cir. 1986).

[42] 805 F.2d 1572 (Fed. Cir. 1986).

[43] The disclosure at issue was made by a corrections officer regarding improper conduct by staff at the prison where he worked. *See Fiorillo*, 795 F.2d at 1550.

[44] Government employees generally may pursue a claim that an adverse employment action inhibits their First Amendment rights. *See, e.g.,* Connick v. Myers, 461 U.S. 138 (1983). In *Fiorillo*, the Federal Circuit declared that the whistleblower protections afforded by the CSRA and the speech protections afforded by the First Amendment "have been considered coextensive rights" in the context of adverse employment actions against government employees. *Fiorillo*, 795 F.2d at 1549.

[45] *See Fiorillo*, 795 F. 2d at 1549-50.

whistleblower's interest as a citizen to discuss "matters of public concern" against the interest of government employer to ensure "the efficiency of the public services it performs through its employees."[46] Only a disclosure on "'a matter of legitimate public concern' upon which 'free and open debate is vital to informed decisionmaking by the electorate'" could be protected; comments on "matters only of personal interest" were outside the CSRA's scope.[47] *Fiorillo* additionally imposed an intent test in balancing the countervailing interests, requiring the whistleblower's "*primary* motivation" to be "desire to inform the public on matters of public concern, and not personal vindictiveness."[48] In *Stanek*, the Federal Circuit further narrowed the scope of protected disclosures.[49] In addition to the test prescribed in *Fiorillo*, a disclosure on a matter of "substantial public concern" was nonetheless not protected by the CSRA if it contradicted a government employer's policy.[50]

A Senate report attached to the WPA expressly condemned the Federal Circuit's decision in *Fiorillo*, explaining that the WPA would cover "*any* disclosure" to clarify that judicially-created loopholes could no longer be used to deny whistleblower protections.[51] Notably, in response to concerns over the Federal Circuit's seemingly anti-whistleblower jurisprudential

[46] *Id.* at 1550.

[47] *Id.* (citing *Connick*, 461 U.S. at 142).

[48] *Id.* Conceding that portions of the whistleblower's disclosures touched on topics about which the public had recently been concerned, the court nonetheless concluded that they were "essentially the airings of [his] personal complaints" and thus not protected by the CSRA. *Id.*

[49] The disclosures at issue were made by a research highway engineer who publicly criticized his agency's selected research and construction methods. *See id.* at 1574-75.

[50] *Id.* at 1578-79. The court reasoned that public disclosures of dissent from an employer's policy should not be protected from reprisal because "cohesive operation of management is dependent on the loyalty of inferior management to superior management." *Id.* at 1579 (citing Brown v. Dep't of Transp., 735 F.2d 543, 547 (Fed. Cir. 1984)). The court therefore found that the whistleblower's disclosures were not protected by the CSRA. *Id.*

[51] "The Committee intends that disclosures be encouraged…the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing." S. REP. NO. 100-413 (1988).

trends, earlier drafts of the WPA contained a provision that would have given all of the circuit courts concurrent jurisdiction,[52] but the provision was ultimately removed.[53]

The WPA made two further changes to the CSRA's language to ease the whistleblower's burden of proof and increase the employer's burden.[54] First, the whistleblower would only have to prove that the challenged personnel action was taken "because of" whistleblowing conduct,[55] rather than "as a reprisal for" it.[56] This change removed the whistleblower's burden of proving that an action was taken with vindictive or punitive intent, reversing a series of cases in which whistleblowers had lost because their employers had "no hard feelings."[57] Second, the WPA articulated the burden of proof a whistleblower had to satisfy: That whistleblowing conduct had been a "contributing factor" in the challenged personnel action.[58] Because the CSRA did not prescribe the standard whistleblowers had to meet, MSPB and the Federal Circuit had consistently imposed the higher burden of requiring proof that whistleblowing had been a "substantial" or "motivating" factor.[59] The WPA filled a final gap in the CSRA by declaring that an employer could only rebut a whistleblower's prima facie case of reprisal if it demonstrated by clear and convincing evidence that it "would have taken the same personnel action in the absence

[52] *See id.*

[53] *See* Devine, *supra* note 3, at 552 n. 109.

[54] *See id.* at 553-55.

[55] Whistleblower Protection Act of 1989, Pub. L. 101-12, § 4, 103 Stat. 16, 32.

[56] Civil Service Reform Act of 1978, Pub. L. 95-454, § 101, 92 Stat. 1111, 1116.

[57] *See* Devine, *supra* note 3, at 554.

[58] *See* Pub. L. 101-12, § 3, 103 Stat. at 26.

[59] *See, e.g.,* Warren v. Dep't of the Army, 804 F.2d 654, 657 (Fed. Cir. 1986) ("We find that in the context of reprisal issues, the inquiry covers not only whether a retaliatory motive exists, but also whether there are independent grounds for initiating an action against an employee.").

of such disclosure."[60] Congress's message was clear: "Whistleblowing should never be a factor that contributes in any way to an adverse personnel action."[61]

C. 1994 WPA Amendments

Despite the sweeping changes theoretically contained in the WPA's language, reprisal against whistleblowers continued at an alarming rate in practice,[62] prompting Congress to enact several major amendments in 1994.[63]

The definition of prohibited personnel practices was expanded in two significant ways. First, a new category of prohibited practices was added, covering an order by an employer that a whistleblower submit to psychiatric examination.[64] Second, a catchall provision was added to prevent employers from evading liability by using a personnel practice not specifically prohibited in the WPA as a means of reprisal;[65] the definition now included "any other significant change in duties, responsibilities, or working conditions."[66] Congress recognized that "the techniques to harass a whistleblower are limited only by the imagination"[67] and that

[60] Pub. L. 101-12, § 3, 103 Stat. at 26. This addition was precipitated by MSPB and Federal Circuit decisions that required employers to meet only a preponderance of the evidence standard. *See, e.g.,* Gerlach v. Fed. Trade Comm'n, 8 M.S.P.R. 268 (1981).

[61] 135 CONG. REC. 5033 (1989).

[62] *See* Devine, *supra* note 3, at 565-66 n. 189.

[63] *See* H.R. REP. NO. 103-769 (1994); S. REP. NO. 103-358 (1994).

[64] *See* Office of Special Counsel and Merit Systems Protection Board Authorization, Pub. L. 103-424, § 5, 108 Stat. 4361, 4363 (1994).

[65] "This personnel action is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing." 140 CONG. REC. 29,353 (1994).

[66] Pub. L. 103-424, § 5, 108 Stat. at 4363.

[67] 140 CONG. REC. 29,353 (1994) (statement of Rep. McCloskey).

confining WPA claims to the limited enumerated categories of prohibited personnel practices effectively gave employers a blueprint for lawful whistleblower reprisal.[68]

Additionally, the amendments made it possible to satisfy the "contributing factor" standard without adducing direct evidence of reprisal; a whistleblower could prevail merely by demonstrating that "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action."[69]

Congress noted that MSPB and Federal Circuit precedents continued to pose the most significant obstacle to effective whistleblower protections, declaring that "the body of case law developed by [MSPB] and [the] Federal Circuit has represented a steady attack on achieving the legislative mandate" of the WPA and that "realistically it is impossible to overturn destructive precedents as fast as they are issued by the…Federal Circuit."[70] An accompanying report compiled a list of the specific MSPB and Federal Circuit doctrines that the amendments were intended to overturn,[71] citing various cases as illustrative of the condemned doctrines.[72] The House of Representatives explained that the Federal Circuit had likely insisted on stringent standards for whistleblower reprisal claims because its jurisdiction was generally limited to

[68] *See* Devine, *supra* note 3, at 567-68.

[69] Pub. L. 103-424, § 5, 108 Stat. at 4363. This provision was intended to overrule a recent decision in which the Federal Circuit expressly rejected a timing-based approach. *See* Clark v. Dep't of the Army, 997 F.2d 1466, 1472 (Fed. Cir. 1993).

[70] H.R. REP. NO. 103-769 (1994).

[71] These doctrines included finding against whistleblowers whenever "an agency believed that outside attention due to the employees protected whistleblowing upset co-workers," when an employee "[blew] the whistle in the context of a grievance," and when an employee failed to "cite the specific law(s) being violated" in a disclosure, among others. *Id.*

[72] *See id.* (citing Haley v. Department of Treasury, 977 F.2d 553 (Fed. Cir. 1992); Knollenberg v. Merit Systems Protection Board, 953 F.2d 263 (Fed. Cir. 1992); Weimers v. Merit Systems Protection Board, 792 F.2d 1113 (Fed. Cir. 1986); Nicholas v. Department of Air Force, No. 92-3472 (Fed. Cir.); DeSarno v. Department of Commerce, 761 F.2d 657 (Fed. Cir. 1985); Baracco v. Department of Transportation, 15 M.S.P.R. 112 (1983), aff'd 735 F.2d 488 (Fed. Cir. 1984)).

highly technical areas like patent law, meaning that it lacked exposure to comparable areas of employment law.[73] Furthermore, the Federal Circuit's exclusive jurisdiction "eliminated the opportunity for the court to compare its decisions and have its decisions criticized by other courts."[74] In fact, the House of Representatives again passed a version of the amendments that would have expanded judicial review of WPA claims to all circuit courts,[75] but this version was abandoned in the Senate in the rush to secure enough votes to pass the amendments before Congress adjourned.[76]

D. Temporary All-Circuit Review

Prompted by several objectionable Federal Circuit decisions, a two-year all-circuit review pilot program was enacted in 2012 and later extended to five years.[77] A few notable whistleblower-friendly developments resulted during the temporary all-circuit review period.[78]

1. Objectionable Federal Circuit Decisions

The Federal Circuit continued to narrow the vast whistleblower protections contemplated by Congress, even after the 1994 amendments to the WPA. It focused primarily on the definition

[73] *See* H.R. REP. NO. 103-769 (1994).

[74] Landau, *supra* note 6, at 475.

[75] *See* H.R. 2970, 103d Cong.

[76] *See* Devine, *supra* note 3, at 572. Several Republican Senators opposed all-circuit review because of their belief in the importance of national uniformity in whistleblower reprisal claims, which they felt could only be secured through exclusive Federal Circuit jurisdiction. *See* Landau, *supra* note 6, at 476 n. 65.

[77] *See* Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199, § 108, 126 Stat. 1465, 1469; All Circuit Review Extension Act, Pub. L. 113-170, § 2, 128 Stat. 1894, 1894 (2014).

[78] *See* Landau, *supra* note 6, at 480-87.

of protected disclosures,[79] defining three categories of disclosures that did not merit protection as exemplified by three leading cases.

The first category included disclosures made directly to the alleged wrongdoer, as illustrated by *Horton v. Department of the Navy*.[80] Reasoning that the WPA was intended to "encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it," and that "[c]riticism is not normally viewable as whistleblowing," the court repeatedly found the entire category of disclosure to be outside the scope of WPA protection.[81]

The second category covered any disclosure made as a part of a whistleblower's employment duties, as in *Huffman v. Office of Personnel Management*.[82] If "the employee ha[d], as part of his normal duties, been assigned the task of investigating and reporting wrongdoing by government employees and, in fact, report[ed] that wrongdoing through normal channels," those disclosures were not protected from reprisal under the WPA.[83]

Finally, the Federal Circuit excluded disclosures regarding publicly known information from WPA protection, as exemplified by *Meuwissen v. Department of Interior*.[84] Reasoning that "[t]he purpose of the WPA is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that

[79] Between 1994 and 2012, this element accounted for 52% of WPA cases decided on the merits by the Federal Circuit. *See* Ohanesian, *supra* note 1, at 625 n. 88.

[80] 66 F.3d 279 (Fed. Cir. 1995).

[81] *Id.* at 282; *see also, e.g.,* Willis v. Dep't of Agric., 141 F.3d 1139, 1143 (Fed. Cir. 1998) (finding that a disclosure of alleged wrongdoing to a supervisor who also engaged in the wrongdoing would not be protected by the WPA because it was not made to someone with the authority to correct the harm).

[82] 263 F.3d 1341 (Fed. Cir. 2001).

[83] *Id.* at 1352.

[84] 234 F.3d 9 (Fed. Cir. 2000).

information," the court refused to protect disclosures about "alleged misconduct [that] was not concealed."[85]

2. Whistleblower Protection Enhancement Act of 2012 and All Circuit Review Extension Act

Faced with the Federal Circuit's continued refusal to interpret the WPA in a manner consistent with its intent, Congress unanimously enacted the Whistleblower Protection Enhancement Act ("WPEA") in 2012.[86] The amendments contained in the WPEA "clarify the disclosures of information protected from prohibited personnel practices" by specifying that the time, place, manner, and motive of disclosures are not dispositive of protection.[87] The WPEA deliberately overrules the Federal Circuit's *Horton*, *Huffman*, and *Meuwissen* holdings, explaining that a disclosure may not be excluded from protection merely because it is made to an alleged wrongdoer, constitutes part of an employee's normal duties, or contains information that is already publicly known.[88]

Even more significantly, the WPEA finally vindicated Congress's longstanding goal of providing for judicial review of whistleblower reprisal claims in all of the circuit courts.[89] While an earlier draft of the bill would have immediately made all-circuit review permanent,[90] several Republican Senators threatened to withhold support out of concern that the bill would unleash a

[85] *Id.* at 13.

[86] *See* Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199, 126 Stat. 1465; Ohanesian, *supra* note 1, at 627-28.

[87] Pub. L. 112-199, § 101, 126 Stat. at 1465.

[88] *See id.* at 1466.

[89] "During the 2-year period beginning on the effective date of the [WPEA], a petition to review a final order or final decision of [MSPB] [regarding whistleblowing] shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction." Pub. L. 112-199, § 108, 126 Stat. at 1469.

[90] *See* S. REP. NO. 112-155 (2012).

flood of litigation in the regional circuit courts.[91] The finalized WPEA was a compromise, establishing a two-year pilot program after which the Government Accountability Office would conduct an impact study.[92]

In 2013, realizing that "few cases [had] as of yet been resolved through alternative court venues,"[93] Congress unanimously passed the All Circuit Review Extension Act,[94] which extended the original two-year program to five years to "provide…a better understanding of whether permanent changes to the MSPB appeal process [were] warranted."[95] In passing the All Circuit Review Extension Act, Congress again noted "the Federal Circuit's overwhelming record of ruling against whistleblowers—a record that [included] a series of questionable interpretations of the law," driving home its intent to improve whistleblower protections by stripping the Federal Circuit's exclusive jurisdiction.[96]

3. Whistleblower-Friendly Developments

Soon after the WPEA's initial grant of all-circuit review, MSPB consciously departed from Federal Circuit precedent in *Day v. Department of Homeland Security*.[97] At issue in *Day* was whether the WPEA's language regarding protected disclosures applied retroactively; this would determine whether the claimant's disclosures, which had been made both in the course of

[91] *See* Landau, *supra* note 6, at 479.

[92] *See id.*; Pub. L. 112-199, § 108, 126 Stat. at 1469.

[93] H.R. REP. NO. 113-519 (2014).

[94] *See* Landau, *supra* note 6, at 479-80; All Circuit Review Extension Act, Pub. L. 113-170, § 2, 128 Stat. at 1894.

[95] H.R. REP. NO. 113-519 (2014).

[96] *Id.*

[97] 119 M.S.P.R. 589, 600-01 (2013).